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1   UNITED STATES DISTRICT COURT
    EASTERN DISTRICT OF NEW YORK
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    UNITED STATES OF AMERICA,      :
3                                  :      04-CR-1016(NGG)
                                   :
4            versus               :      United States Courthouse
                                   :      225 Cadman Plaza East
5                                  :      Brooklyn, N.Y.  11201
    RONELL WILSON,                 :
6                                  :
                                   :      DECEMBER 1, 2012
7            DEFENDANT.           :      9:00 A.M.
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9                      TRANSCRIPT OF HEARING
          BEFORE THE HONORABLE NICHOLAS G. GARAUFIS
10             UNITED STATES DISTRICT COURT JUDGE

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25  Proceedings recorded by mechanical stenography, transcription
    by computer-aided transcription.
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Official Court Reporter

Proceedings

1   (In open court; defendant present.)

2   THE CLERK: United States versus Wilson.

3   THE COURT: Please be seated in the back.

4   Appearances, please.

5   MR. McGOVERN: James McGovern, Celia Cohen and

6   Keltan Mui, from ATF, on behalf of the Government.

7   Good morning, your Honor.

8   THE COURT: Good morning.

9   MR. BURT: Good morning, your Honor.

10   Michael Burt, Collen Brady, and David Stern on

11 behalf of Mr. Wilson, who is present.

12   THE COURT: Good morning. Good morning everyone.

13   All right, Ms. Cohen, you're going to cross-examine?

14   MS. COHEN: Correct, your Honor.

15   MR. BURT: Yes, sir.

16   THE COURT: And are we ready to go on the next

17 witness?

18   MR. BURT: Yes, Judge.

19   THE COURT: Let's bring in the next witness.

20   Call your witness.

21   MR. BURT: We call Joette James, your Honor.

22   THE COURT: Very well.

23   THE CLERK: Please raise your right hand.

24   (Witness takes the stand.)

25   (Witness takes the stand.)

                          Proceedings

1   **JOETTE DEANNA JAMES,**

2   called as a witness, having been duly sworn, was examined and

3   testified as follows:

4   THE CLERK: Please have a seat. Please state and

5   spell your full name for the record.

6   THE WITNESS: My name is Joette Deanna James. My

7   first name is spelled J-o-e-t-t-e. Deanna, D-e-a-n-n-a.

8   James, J-a-m-e-s.

9   THE COURT: Very well. You may inquire.

10   MR. BURT: Thank you.

11   DIRECT EXAMINATION

12   BY MR. BURT:

13   Q   Good morning.

14   A   Good morning.

15   Q   Dr. James, did you bring with you a binder of material

16   which has been premarked as Exhibit Q?

17   A   Yes, I did.

18   Q   Is that sitting in front of you?

19   A   Yes, it is.

20   MR. BURT: Your Honor, the Court has a copy of that

21   on its desk up there to the right.

22   THE COURT: All right, thank you.

23   Q   Could you tell us your business or occupation, please.

24   A   Yes. I am a pediatric neuropsychologist.

25   Q   And where do you practice your profession?

James- Direct/Burt

1   A   In Washington, D.C. at HSC Pediatric Center; it's also

2   called the Health Services for Children Center. It is

3   affiliated with Children's National Medical Center in

4   Washington, D.C.

5   Q   And how long have you worked there?

6   A   I have worked there since 2006.

7   Q   What is it that you do there on a daily basis?

8   A   As a pediatric neuropsychologist, I evaluate a range of

9   individuals from ages infancy, toddlerhood, all the way to

10 young adulthood, who present both inpatients and outpatients

11 with a range of acquired and developmental disorders.

12   Development disorders would include disorders such

13 as ADHD, learning disabilities, intellectual disability, and

14 autism. And for the acquired disorders in this rehabilitation

15 setting, I also see individuals who have had traumatic brain

16 injury, brain tumors, and seizure disorders.

17 Q   As part of your work there distinguishing between

18 disorders; in other words, distinguishing between, say, a

19 learning disability and intellectual disability?

20 A   Yes. I often have referrals from schools, from parents,

21 from other providers who are asking a diagnostic question, in

22 terms of what type of developmental disorder may be present,

23 and I have to make differential diagnosis.

24   I also see complex children and young adults and

25 infants who have more than one disorder as well, both acquired

James- Direct/Burt

1   and developmental.

2   Q   Now, the binder that's in front of you, does it contain a

3   tab, the second tab there which is a copy of your CV?

4   A   Yes, it does.

5   Q   Does the CV accurately list your credentials?

6   A   Yes, it does.

7   Q   And is the other material in the binder your report, your

8   raw testing data, your PowerPoint and some IQ score charts and

9   also an article?

10   A   Yes, it does.

11   Q   And did you rely upon the material in that binder in

12   forming your opinions in this case?

13   A   Yes, I did.

14   MR. BURT: I move Q into evidence, your Honor.

15   MS. COHEN: Your Honor, my -- the only objection we

16   have is that the PowerPoint presentation in Defense Exhibit Q

17   is something that the government just received. We haven't

18   had a chance to review it. This is a PowerPoint. I mean, the

19   IQ issue that this witness is going to testify about is a

20   central issue in this case. And to have a 46-page PowerPoint

21   just given to us just right now before this witness, we object

22   to that, as we haven't had time to review it.

23   And for those reasons, we object to it being

24   included in Defense Exhibit Q, although the rest of it we have

25   no objection.

James- Direct/Burt

1   MR. BURT: Your Honor, let me explain that the

2   witness is not going to be going through the PowerPoint. I

3   just wanted the Court to be aware that she had prepared a full

4   presentation. There are a couple of slides in there that

5   relate to the IQ testing issue that we are going to explore,

6   but I don't intend to go through the PowerPoint. It's there

7   for the Court's benefit. She did prepare it in preparation

8   for a full direct examination; that's why it's included.

9   MS. COHEN: Your Honor, may I suggest -- I mean, we

10   have no objection if maybe at some point today I could just

11   have a chance to review it. So subject to that, we could

12   allow it into evidence but --

13   THE COURT: All right, why don't we do that. And

14   you'll let me know by the end of the day whether you have any

15   objection.

16   As to those pages of the PowerPoint that the witness

17   is going to refer to in her testimony, we'll take it up at the

18   time that she be presented to the Court.

19   MR. BURT: Thank you.

20   THE COURT: All right. So everything else in

21   Exhibit Q is received into evidence, except the PowerPoint,

22   which will be the subject of further discussion by the end of

23   the day.

24   MR. BURT: Thank you very much.

25   (Defendant's Exhibit Q received in evidence.)

James- Direct/Burt

1   THE COURT: On consent of the parties.

2   Q   And your CV accurately lists all your publications and

3   your experience in the area of neuropsychology. Right?

4   A   Yes, it does.

5   MR. BURT: Your Honor, I would offer Dr. James as an

6   expert in forensic neuropsychology, as it relates to

7   developmental disorders. And I can certainly develop further

8   qualifications, but since the CV is in evidence and I'm trying

9   to move this along, I would submit the issue at this time.

10   THE COURT: Ms. Cohen, do you have an objection?

11   MS. COHEN: I have no objection. Brief voir dire?

12   THE COURT: Of course.

13   MS. COHEN: Thank you.

14   VOIR DIRE EXAMINATION

15 BY MS. COHEN:

16 Q   Good morning, Dr. James.

17 A   Good morning.

18 Q   My name is Celia Cohen. We haven't met but I'm one of

19 the prosecutors in the case.

20   You are, as you said on direct examination, a

21 pediatric neuropsychologist. Correct?

22 A   Yes, I am.

23 Q   And your main practice, your clinical practice is focused

24 on children?

25 A   Yes. I've seen about 600 children, a little over 100

James- Voir Dire/Cohen

1   adults.

2   Q   And throughout -- obviously in your clinical work, you

3   come across, as you said, children with all kinds of

4   disabilities?

5   A   Yes, I do.

6   Q   But your focus for a very long time has really been in

7   the autism area. Correct?

8   A   No. Actually, my research has been in the autism area,

9   but clinically I've seen -- I routinely see individuals with a

10   range of developmental disabilities.

11   Q   Okay. That's why I'm asking because I see a huge list of

12   autism research.

13   A   Yes. I'm primarily a clinician, not a researcher.

14   Q   Okay. And a lot of your work, however, related to

15   intellectuals or the focus on intellectual disability really

16   came about with respect to your forensic work. Correct?

17   A   No, I see, again, a wide range of individuals in clinical

18   practice with intellectual disabilities.

19   Q   Well, of course. And individuals who come to you may

20   think they have one thing and then it turns out they have

21   intellectual disability?

22   A   Sometimes. And sometimes I see children -- in the

23   rehabilitation hospital in which I work, the primary

24   population is children with intellectual disability. It's a

25   rehab population with children with developmental disorders,

1   many of whom have intellectual disabilities ranging from mild

2   to very severe.

3   Q   But with respect to your forensic work, is it correct

4   that the first time you testified was in an Atkins hearing?

5   A   Yes, it was.

6   Q   And that was in 2009?

7   A   Yes. Correct.

8   MS. COHEN: No further questions and no objection to

9   this witness.

10   THE COURT: All right. And the motion is to qualify

11   the witness as an expert in forensic neuropsychology as it

12   refers to which type of disorders?

13   MR. BURT: Developmental disorders including

14   intellectual disabilities.

15   THE COURT: All right, the motion to qualify the

16   witness as such an expert is granted.

17   MR. BURT: Thank you.

18   DIRECT EXAMINATION

19   BY MR. BURT:

20   Q   Doctor, you said you were primarily a clinician.

21   Correct?

22   A   Yes.

23   Q   And in your role as a clinician with the patients that

24   you see, is your work involved in diagnosing intellectual

25   disability?

James - Direct/Burt

1   A   Yes, it is.

2   Q   What is the role of a neuropsychologist, such as

3   yourself, in diagnosing? What tools do you bring that say a

4   normal -- a non-neuropsychologist brings to diagnosis?

5   A   Right. Well, like, a neuropsychologist has an additional

6   two years of postdoctoral training in understanding the

7   relationship between the brain and behavior, particularly

8   dysfunction or impairment in the brain and how that impacts

9   behavior, in terms of everyday functioning.

10   And so we use, in addition to IQ measures, a number

11   of tests and evaluative tools which assess other domains, such

12   as memory, language functioning. We also look at academic

13   skills. We will get executive functioning, which includes

14   types of skills such as initiation, flexibility, attention,

15   working memory.

16   We evaluate a number of domains in addition to that

17   of IQ.

18   Q   And what is the relationship between intellectual

19   functioning as it's used in the Atkins test and neuro --

20   neuropsychological deficits? Is there any connection between

21   the two?

22   A   Yes. There's a relationship between the kinds of -- the

23   kinds of abilities which underlie intelligence as estimated by

24   an IQ score are also the kinds of abilities that assessment in

25   neuropsychological domains also tries to -- tries to evaluate,

James – Direct/Burt

1   tries to assess.

2   So, for example, a neuropsychologist will have

3   assessment measures which will look at, in particular, I think

4   the one that's most relevant to intelligence is really

5   executive functioning. So executive functioning is an

6   umbrella concept which describes a number of abilities that

7   enhances someone's functioning in the real world. So your

8   ability to focus on a task, attend to a task and not be

9   distracted by other kinds of things that are going on. Your

10   ability to organize your approach to initiate an action

11   without being prompted or reminded. Your ability to flexibly

12   move and strategize from one kind of element to another.

13   All of those skills are the bridge, in terms of our

14   understanding of brain development, and impact daily

15   functioning in life.

16   Q   Now, what was your role in this case?

17   A   My role in this case was to review a number of documents

18   related to Mr. Wilson's educational, psychological, previous

19   psychological assessments, medical records, et cetera, and to

20   evaluate those documents and look at the need for additional

21   testing, additional neuropsychological testing that would

22   illuminate his profile of strengths and weaknesses and

23   functioning.

24   Q   And part of your view in this case was to look at the

25   historical IQ scores that were given here?

James – Direct/Burt

1   A   Yes.

2   Q   I think one of the questions that's been raised by the

3   Court is which of these IQ scores can I rely on; and if I

4   can't rely on them, why not? You're familiar with that

5   question?

6   A   Yes, I am.

7   Q   You've reviewed the transcript of this hearing as it's

8   gone along?

9   A   Yes, I have.

10   Q   Okay. Now, do you have a tab in your binder which says

11   *IQ scores?*

12   A   Yes, I do.

13   Q   And you're familiar that other experts have talked about

14   a similar chart than the one that -- you have three charts

15   here. Correct?

16   A   That is correct.

17   Q   And just review for us what the three charts are;

18   what they show.

19   A   So the first chart -- the first two charts are similar in

20   that they give the date at which, date, age, and examiner and

21   tests that Mr. Wilson was administered, as well as the year in

22   which the test was norm, in order to create a full scale IQ

23   that is corrected for the obsolescence of norms, as well as

24   the verbal IQ, the performance IQ, and the full scale IQ.

25   In the case of the WAIS-IV, the WAIS-IV changed from

James – Direct/Burt

1   a two-factor solution from verbal and performance IQ to a

2   four-factor solution. So for the WAIS-IV, in particular we

3   have the -- not a verbal IQ but the verbal comprehension index

4   as it is named. And instead of a performance IQ, we have the

5   perceptual reading index.

6   There is the corrected full scale IQ and then a 95

7   percent confidence interval that's calculated using the

8   standard error of measurement. Based both one column on the

9   average standard error of measurement, which takes into

10   account all of the ages, the full scale IQ for all of the ages

11   across the particular test that's being looked at, as well as

12   a more precise 95 percent confidence interval based on the

13   standard error of measurement by age for the particular test.

14   Q   That's the first trier. Correct?

15   A   That is the first trier.

16   Q   Now, are you aware from reading the transcript that an

17   issue was raised during the questioning of Dr. Shapiro by the

18   Court about a 99 percent confidence interval?

19   A   Yes, I am aware of that.

20   Q   Did I ask you to go back and compute what the confidence

21   intervals would be used in the 99 percent confidence interval?

22   A   Yes, yes, I'm aware of that.

23   Q   And is that the purpose of Chart 2?

24   A   Yes. Chart 2 is the same as Chart 1 with the exception

25   that the standard error of measurement has been used to

James – Direct/Burt

1   calculate 99 percent confidence intervals both by the average

2   and by age.

3   Q   And the third chart there?

4   A   And the third chart is just the base calculations that

5   were used in order to -- in order to calculate the confidence

6   intervals that I've named, both the 95 percent confidence

7   interval and the 99.

8   Q   So if you could turn to the very first chart beyond that

9   tab, that's the general one that sets forth the scores?

10 A   Right. Yes.

11 Q   And I just want to focus you on the Court's question,

12 which is: *Which of these scores can we rely on? And if we*

13 *can't rely on individual scores, can you explain why we can't*

14 *rely on them?*

15 A   Yeah. I -- the scores that I feel that are the most --

16 the ones in which I feel I can rely on the most, and give the

17 most weight to are the ones for which -- and I can expand on

18 this further -- for which we have raw data and are more

19 reliable for other reasons as well. And those are

20 Dr. Nagler's report, Dr. Drob's report, and Dr. Denney's.

21 Q   Okay. And other than those three testing events, are you

22 saying that we don't have raw data for any of the other tests?

23 A   No, we don't have raw data for any of the other IQ tests.

24 Q   And is it your opinion that those other tests should

25 simply be disregarded, or how would you characterize what

1   weight you can put on those tests given the absence of raw

2   data concerning them?

3   A   Right. I don't think that they should be disregarded. I

4   think it's a matter of considering relative weight given that

5   with the lack of raw data we are not able to assess important

6   areas such as scoring errors, potential scoring errors or

7   potential deviations from nonstandardized administration.

8   Q   Now, explain to me why you feel that having raw data for

9   the testing is important in assessing reliability of the

10 historical scores?

11 A   Because when you have the raw data, you have more than

12 just composite scores and individual scaled scores. You have

13 the underlying means by which those scores were calculated.

14 So you're able to -- for example, on the verbal side, those

15 are the types of measures which require a somewhat subjective

16 scoring rubric.

17   So for vocabulary, for example, you can score an

18 answer, a two or a one or a zero, and the book provides -- the

19 TECTA manual provides some guidelines as to the scoring but

20 there is a subjective component to that.

21   And there is research to show that scoring errors

22 are in fact quite common, both with experience and

23 inexperienced examiners, and can alter full scale IQs from 16

24 to 18 points.

25   And so having the -- and the scoring errors tend to

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James – Direct/Burt

1   occur more on these subtests that are based on a rubric of

2   some kind, assigning a two, one, or zero, although they can

3   also occur on some of the subtests which make up the

4   performance scale which involve timing; so accurate timing and

5   accurate recording of that time.

6   So having the raw data allows one to look back at

7   the scores, the answers themselves, the verbal responses and

8   to make an assessment of the accuracy of that response.

9   Q   Now, in this case, for the tests that you had raw data

10   for, that is Nagler, Drob, and Dr. Denney, were you in fact

11   able to review that raw data and find some errors?

12   A   Yes. For example, in Dr. Nagler's assessment using the

13   WISC-III, there is a scoring error on the first page on her

14   face sheet in which she mistakenly adds the -- the scale

15   scores which make up the verbal IQ she reports as a 20 instead

16   of a 19. That's an error of one scale score point, but it

17   does alter the verbal IQ. It brings it from a 66 to a 65 and

18   does alter the full scale IQ from a 71 to a 70.

19   Q   So one error, like one arithmetic error like that can

20   actually alter the score?

21   A   Yes, it can.

22   Q   And was that error verified by the government's experts?

23   In other words, when they examined the raw data, did they

24   confirm that that error existed?

25   A   Yes, they did.

James – Direct/Burt

1   Q   Okay. How about for Dr. Drob's WAIS testing, when you

2   reviewed the raw data there, did you find errors? And, if so,

3   did they affect the full scale IQ?

4   A   No, I did not find any errors in reviewing Dr. Drob's

5   WAIS-III.

6   Q   And how about for Dr. Denney?

7   A   Dr. Denney, I did not find any errors there either.

8   Q   Now, starting with the first score at age six months --

9   six years, eight months, given in nineteen seventy -- 1989,

10   with the WAIS-R. What weight, if any, do you place on --

11   first of all, what data did you have to review regarding that

12   first score?

13   A   There was no raw data to review for that score.

14   Q   And what did you have to review?

15   A   I had a report to review, I believe with some -- with

16   scaled scores and composite scores.

17   Q   So basically just the reporting of the scores but nothing

18   on how she got the scores?

19   A   Exactly.

20   Q   And what weight, if any, can be placed on that score at

21   age -- besides the raw data issue that you discuss, are there

22   other issues in respect to this first testing at age six?

23   A   Well, it is the first time that he is being assessed.

24   Mr. Wilson is being assessed at age six, and it's using the

25   WISC-R, which was norm in 1972. The date of the norming of

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1   the WISC-III, which was the next version, was actually in

2   1989. So that was being conducted at the time. And so that

3   at that point at which the -- at which Dr. Abramson's WISC was

4   administered, the WISC that she administered was several --

5   many years outdated and, therefore, when you look at those

6   scores, the uncorrected scores, what you see especially in

7   comparison to the next set of scores at age nine, seven, their

8   full scale is quite high in comparison.

9   When you correct for the obsolescence of the norms

10   which was at its peak at that moment because the second -- the

11   new version was just in the process of being normed, and you

12   look at the two scores, the corrected full scale IQ -- the 78

13   and the 77 -- they are very close.

14   Q   And what does that tell you in terms of the reliability

15   of the first score?

16   A   Well, looking at it uncorrected, it's a problematic score

17   because of the obsolescence of those norms and the fact that

18   it was so out of date. The old norms were being used at that

19   time.

20   Q   Now, on the first score, in addition to no raw data and

21   the use of agent norms, is there anything else in regard to an

22   IQ test given at age six, six months -- six years, eight

23   months?

24   A   As I mentioned, that's an IQ score given at the time when

25   the -- when the individual is just eligible for the

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1   administration of that IQ measure. So the WISC goes from age

2   six to 16. So at that point Mr. Wilson is right at the lower

3   end of that measure. And what we know about the

4   predictability of scores taken at younger ages is that they're

5   not as predictable of the types of tasks that one would be

6   asked to perform as a young adult or an adult, simply because

7   the types of tasks that are administered are not ones that are

8   particularly instructive around some of these executive

9   functioning domains I mentioned that do have an impact upon

10 daily living. For example, as I mentioned the ability to

11 attend for as long as necessary. The ability to hold

12 information in working memory and use that information to

13 guide behavior or to consolidate learning. The ability to

14 flexibly change strategies and problem solve.

15   At a young age like six, even though there is rapid

16 development in the brain prior to the age of six, there is a

17 protracted period of frontal lobe network development that

18 happens around these executive functioning skills. So they

19 can't be assessed at six. Typically in my practice we start

20 assessing those skills around age, late elementary school; so

21 age nine or so.

22   And so it's predictive of his ability in comparison

23 to other six-year-olds at the time, but not as much in

24 relation to what he would be expected to do as a young adult

25 or adult.

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James – Direct/Burt

1   Q   You're familiar with the National Research Council's

2   book, *Mental Retardation: Determining Eligibility for Social*

3   *Security Benefits?*

4   A   Yes.

5   Q   And there's a statement in that book that says, at page

6   126: "For children between the ages of 3 and 6, total test

7   scores might reasonably be considered valid for one year."

8   A   Exactly.

9   Q   Do you agree with that?

10   A   I do agree with that for the reasons that I just

11   mentioned. That in the course of brain development there is

12   much that happens as one ages. These executive skills really

13   continue to develop into the early 20s. And so a score that

14   one gets at that young in age, again, it isn't -- it isn't

15   very predictive of later functioning. And that's why it's

16   really only valid in terms of childhood benefits, not in terms

17   of later benefits.

18   Q   Now, just to be clear, that first score, although it's

19   affected by the age in which it was given, by lack of raw data

20   and by the use of these outdated norms, it is not affected by

21   practice effects, is it?

22   A   No, it is not. This would be the first administration.

23   Q   Okay. Now, how about the second test, the one given by

24   Dr. Drezner in 1991, when he was nine years, seven months?

25   First of all, what testing information did you have

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1   for that instrument? If you need to refresh your memory, the

2   actual file which I believe is -- Exhibit C-5 is in front of

3   you.

4   A   Again, with Dr. Drezner, we did not have raw data.

5   Q   What did you have?

6   A   We do have scale scores as well as composite scores. So

7   composite scores would be the verbal IQ, the performance IQ

8   and the full scale IQ.

9   Q   And did you have what are called *subtest scores?*

10   A   Yes, that's the subtest scale scores.

11   Q   And was -- does the verbal IQ and performance IQ each

12   depend on giving certain subtests?

13   A   Yes. Yes, they do. In order to develop the composite

14   scores. So the larger scores, index scores, those scores are

15   based on a core set of subtests.

16   Q   And is one of the things you're looking for when you're

17   reviewing these historical scores whether the full number of

18   subtests was given?

19   A   Right. I'm looking for the full complement of scores,

20   the core scores that are -- that make up each of those

21   domains: The verbal, the performance, and the full scale IQ.

22   Q   And for this one do we have a full complement of

23   subtests?

24   A   No, we don't. Because Dr. Drezner used a supplemental

25   score for means, instead of the core score for object

James – Direct/Burt

1   assembly. So she did not give object assembly, she gave means

2   instead.

3   Q   And what impact does that substitution have just in

4   general?

5   A   Well, it's just -- it's a departure from nonstandardized

6   procedures and there could -- there's a reason that in terms

7   of the norming and standardization creation of the test, that

8   object assembly was included in that performance scale. So

9   there's something that is unique about object assembly or a

10 way in which object assembly contributes to the overall score

11 and to the performance scales that makes it a core subtest.

12   So the substituting another subtest alters that

13 configuration and may then alter the meaning of that, of that

14 composite and then further the meaning of the full scale.

15 Q   So what weight, if any, can you give to this score,

16 considering not only the factors you just discussed but other

17 factors as well?

18 A   Right. I mean, I think it calls -- it -- it says that's

19 a concern and that's a score, both in terms of the performance

20 scale score -- I mean, performance IQ score and the full scale

21 IQ score that needs to be given less weight given the

22 departure from nonstandardized procedures.

23 Q   Now, what about the issue of the use of aging norms in

24 relation to this test?

25 A   Well, the WISC-III was norm in 1989, and this

1 administration was given in 1991. So there is a correction

2 that needs to be made for that fact. And you'll see that

3 correction that I made there from the full scale IQ of 78 to

4 77. It's about a point.

5 Q   Right. And is there also an issue here with respect to

6 the age at which the score was given, that is age nine, seven

7 months?

8 A   Like I mentioned earlier, again, this is a score, this is

9 a time period where you'll have less predictability in terms

10 of what kinds of skills would be expected of someone as a

11 young adult. So it's more predictability than there is at age

12 six but still less in terms of the overall picture.

13 Q   Now, for that age group, the social security manual says:

14 "Among children and adolescents between the age of 6 and 16

15 years, total test scores should be considered valid for as

16 long as three years."

17   Do you agree with that?

18 A   I do agree with that. And that changed from what would

19 be considered valid for a six-year-old and what would be

20 considered valid for a nine-year-old reflects just what we've

21 been discussing, that the score at nine has more predictive

22 power for -- but not as much -- not as much later and more

23 than earlier. So it holds for three years as opposed to

24 holding for one.

25 Q   Okay. And how about in relation to this score practice

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1   effects?

2   A   Right. At this point this is the -- this is the second

3   Wechsler that Mr. Wilson has been given. The first was III.

4   So practice effects are in play here in terms of exposure

5   to -- he's already been exposed once to this type of measure

6   and particularly we know that practice effects are larger for

7   novel items, like those on the performance scale, lock design

8   for example or ones that involve tasks that typically one has

9   not -- one doesn't encounter in everyday life, rather than for

10 the -- the kind of hold, know it, or don't know it vocabulary

11 and other types of measures that are on the verbal scale.

12   So practice effects are not uniform and they can be

13 variable as -- as -- at any administration and visible or not

14 visible. So certainly that is a consideration that when we're

15 looking at exposure to an instrument for more -- after more

16 than one occasion.

17   THE COURT: Do you find that practice effects are

18 more significant where the tests are given at an earlier age

19 or at a later age?

20   THE WITNESS: I don't -- the thing about practice

21 effects, I mean, there is no uniformity, that has been my

22 experience, so that you can see them, sometimes you see them

23 on the second administration, sometimes you see them on the

24 fourth administration. I think that's the nature of

25 variability.

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1   THE COURT: Is the interval between the

2   administration significant to you?

3   THE WITNESS: It can be. That can have an effect on

4   practice effects. So we do know that retest -- test-retest

5   intervals can diminish practice effects or it can enhance

6   them.

7   Q   And in terms of the age, in other words, I -- the

8   question is: Do practice effects increase at earlier age,

9   say, at the age of six, as opposed to maybe when you're giving

10   multiple administrations at the age of 18 or 21?

11   A   Yeah. I mean, I think the more times you've been given

12   the tests, the more likely you're going to see a practice

13   effect but the point is that practice effects are variable.

14   Q   But there's no effect that's related to age? In other

15   words --

16   A   There's no effect that's related to age, yeah.

17   Q   Okay. How about I -- I think one of the other questions

18   the Court had for another witness, how can you say those

19   practice effects in those first two scores, if you look, you

20   said it mainly affects performance, right?

21   A   It primarily affects performance for the reason that

22   the -- the items on the performance scale are typically items

23   with which someone has had very little exposure in life, with

24   the exception of, you know, sometimes we think of oh, okay,

25   someone has had experience with puzzle assembly or something

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1   like that and that there may be an enhancement of performance

2   for that reason.

3   But in general, there is more of an effect for

4   something that is novel versus a test where you know the

5   answer, you know what like means or you don't. For example,

6   to define the vocabulary word bicycle, you know what a bicycle

7   is or you don't. And if you don't know it two years ago, you

8   may not know it now.

9   Q   And in this case if you look at those first two scores on

10   the performance, on the first score he has a 90 unadjusted,

11   and then the second score he actually goes down. So can't we

12   be sure from that that practice effects are not at play

13   because the score actually is not increasing, it's going down?

14   A   Right. And that goes back to what I said about

15   variability. When you introduce -- variability is about

16   introducing error. And error can come from many sources. So

17   there is error that is just simply associated with the test,

18   measurement error, and that's where the standard error of

19   measurement comes from. It's simply error that's associated

20   with the test-retest reliability. And it's -- it's

21   test-specific. Also age subgroup-specific. That's one type

22   of error that we have.

23   But there are other sources of error. And you can

24   think of anything that brings in variability in a score is

25   error. And so something like practice effects introduce error

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1   but that's another type of error associated with the test.

2   There are other kinds of error associated with the examinee,

3   associated with the testing condition, associated with the

4   examiner that are not accounted for by the standard error of

5   measurement.

6   And so it's those kinds of error that bring –– that

7   increase variability and cause any one particular source of

8   error to not be as predictable as we think it should be.

9   So if we think that practice effects will just cause

10   gradual increase in scores, that might not be –– that might

11   not be so given that there are other sources of error in the

12   mix. Practice effects can –– you think makes a pattern where

13   there are sources of error like test-retest intervals which

14   will diminish a practice effect, so the practice effect may

15   not necessarily follow as clearly as we think it should.

16   Q   And is there any significance to the number of practices,

17   in other words, he's given the second test is given 91 and

18   then thereafter he's given five more tests before he comes to

19   Dr. Denney? Is there any significance in the repeated nature

20   of the instrument being given as it applies to practice?

21   A   Right. There's research that show that practice effects

22   can happen at variable intervals. So you can have a practice

23   effect after –– there's research that shows practice effects

24   can happen after a few weeks, they can happen after a few

25   years, they can happen as much as 13 years on from the

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1   original test. So practice effects, there's no ideal

2   interval, there's no maximal or minimal interval for the --

3   for a practice effect. They can occur at any interval,

4   essentially.

5   Q   Okay. So because of practice effects the use -- the

6   aging norms which you've adjusted for, is there anything else

7   about that second score that is significant in terms of how

8   much weight we can place on that score?

9   A   I'm sorry, you're looking at the Drezner?

10   Q   Yes.

11   A   Yeah. Those were the ones that I identified as being the

12   most problematic.

13   Q   How about the Aaron November score in '93, what did you

14   have there?

15   A   So with Aranoff, again this is the third administration

16   of a WISC instrument -- of a Wechsler instrument, and second

17   of the WISC-III. So we do have ongoing continuation of the

18   impact of addition of error which creates variability in the

19   scores associated with the lack of novelty and potential

20   practice effects.

21   We also have the lack of raw data for Aranoff as

22   well. And in addition, there is some -- we don't have -- we

23   don't have the raw data but we do have the report and I

24   believe it was -- there was a handwritten section and a

25   printed section and there is inconsistency in the reporting of

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1   the performance IQs.

2   So the performance IQ at one point is reported,

3   twice reported as 90. In another instance it's reported as

4   93. And while those numbers seem close, similar to what

5   happened with Drezner, it does affect the calculation of --

6   I'm sorry, similar to Nagler, it does affect the calculation

7   of the performance of the overall IQ, depending on whether

8   it's a 93 or a 90.

9   Q   And did she administer the full battery? Could you tell

10   from the information you had?

11   A   Let me -- I need to take a look.

12   For this administration, there are composite scores,

13   so there are verbal performance and full scale IQ scores but I

14   don't see any scale scores.

15   Q   So is there any way to tell whether she administered the

16   full number of subtests that --

17   A   Not definitively. She does describe performance on any

18   individual subtests in narrative form.

19   Q   And the testing booklet you say was not available?

20   A   No, it was not.

21   Q   Okay. So what are the -- what weight can you put on this

22   score?

23   A   Well, given the error or potential error in the double

24   reporting of the performance IQ, as well as some of the issues

25   that I mentioned before, in terms of obsolete norms and --

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1   that's another -- and the lack of raw data, I think is another

2   example of an IQ test that we can consider but give less

3   weight to.

4   Q   Now, Nagler you said you did have the raw data for and

5   you were able to place reliance on that score?

6   A   Yes, I do.

7   Q   All right. How about Mitchell Frank, the 1997

8   administration?

9   A   The Frank administration we don't have -- we're not able

10   to calculate competent scores from that. There is no way to

11   do a verbal IQ and a performance IQ or a full scale IQ because

12   he did not give enough subtests in order to do that. So he

13   administered five subtests of the WISC, four verbal and one

14   nonverbal. One performance.

15   Q   So you simply don't have a score on that one?

16   A   No, we don't have the -- enough -- we don't have enough

17   scores, enough scores to --

18   Q   Was there anything of significance in the Frank testing

19   that you can use that's relevant to the intellectual

20   functioning problem?

21   A   There were some subtest scale scores on the -- the

22   subtest scores that were reported indicate -- he described

23   them as in the mildly deficient range for the verbal side. So

24   the four he did give, he described Mr. Wilson's performance as

25   mildly deficient, which is what we say when we are referring

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1   to scores that are significantly below age expectations.

2   Q   And was his scoring on those subtests consistent or

3   inconsistent with intellectual disability?

4   A   Consistent.

5   Q   Now, how about the Giglio score in 1998, this is now the

6   fifth time he's been given the WISC-C?

7   A   Yes, so this is the fifth time he's been given -- the

8   sixth time he's been given the Wechsler instrument, fifth time

9   that he's been given specifically the third edition of the

10 WISC. So we definitely have a concern here with exposure to

11 items. And exposure really means either -- and the way in

12 which we think about what happens when novelty wears off, it's

13 really both in terms of actual items but also in terms of the

14 way in which one approaches the items. So procedurally when

15 you've been exposed to a test multiple times, you may not

16 remember the items or you might but you may also just have a

17 sense of how to approach the task which can influence

18 performance as well.

19   So we have the fifth time that he's given a

20 WISC-III, sixth time he's been given a Wechsler instrument.

21 We don't have raw data, again, for Giglio's scores at 15 and

22 11.

23 Q   All right. And although you report a full scale IQ of 80

24 in your report, is that what Giglio did in his -- in his

25 analysis?

1   A   He determined the full scale IQ in this instance to be

2   invalid given the 25 point difference between his --

3   Mr. Wilson's verbal -- performance on the verbally-based test

4   and the nonverbal test.

5   Q   And do you agree that that's an invalid score or no?

6   A   I think that that score is a valid score in terms of the

7   fact that the full scale IQ really is the best measure of

8   overall performance. There is a significant difference

9   between the two scores, but there's a difference between

10   statistical significance and clinical or marked significance

11   which occurs at the base rate of 15 percent or below. So it

12   means it's uncommon in population. So I could still -- would

13   still consider that as norm IQ.

14   Q   Okay. Arthur Popp in 2000. What factors, if any, bear

15   on the reliability of his scores?

16   A   Right. In Dr. Popp's evaluation, which was at 17 years,

17   eight months, this is the -- now the seventh administration of

18   a Wechsler instrument, seventh. It's the first administration

19   of the adult version which is the WAIS-III. We don't have,

20   again, raw data for Dr. Popp's administration.

21   And in addition to that, when I reviewed the face

22   sheet which included the scale scores and the composite

23   scores, so again the verbal and performance and full scale IQ

24   scores, when I looked at the scale scores for that particular

25   administration, what I noticed was that it was prorated, the

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1   performance IQ.

2   Q   Meaning?

3   A   It means that he did not give all of the subtests that

4   are typically included as part of the core subtests to

5   calculate a performance IQ. He did not give picture

6   arrangement or symbol search.

7   Q   The ones he did not give, were they one -- were those

8   subtests that on previous administrations Mr. Wilson had

9   scored low on?

10   A   I believe -- I would have to check back to -- to picture

11   arrangement and symbol search.

12   In Dr. Abramson's evaluation, Mr. Wilson earned a

13   scale score of seven on picture arrangement which corresponds

14   to the 16th percentile.

15   Q   Meaning --

16   A   Meaning that 84 percent of the population performed

17   better -- of his age performed better than he did on that

18   particular subtest. That's a score that we would call in the

19   below average range.

20   With Dr. Drezner, he earned a five on picture

21   arrangement, which was at the fifth percentile for age.

22   Q   The other one you said he omitted was --

23   A   Well, Dr. Aranoff, I don't believe that there are scale

24   scores. No, she did not report scale scores, so I don't have

25   that for comparison.

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1   Symbol search was not given as part of Dr. Drezner's

2   evaluation, it wasn't one of the subtests at the time.

3   Q   So you don't know how he would have scored on those?

4   A   No, I don't.

5   Q   So on the Popp administration, how much weight can you

6   place on that score given that he didn't give all the

7   subtests?

8   A   I would have to assign less weight to it since we --

9   because, again, it is a deviation from standard administration

10   to not administer all the subtests needed for the composite

11   score and for the full scale score, IQ score.

12   Q   And what about practice effects in terms of this score,

13   where he's going -- you look at Giglio, he's got a 95, then

14   Mr. Wilson goes on Popp score to 92, so it's three points

15   less.

16   A   Right.

17   Q   Can you say that because of that three-point drop

18   practice effects are not at play here?

19   A   No. I mean -- and like I said, the function of practice

20   effects is not uniform. So we're talking about a different

21   version of the test now, however, and so that may be

22   responsible for some of the difference, but there are also

23   some of the subtests that are the same from test to test.

24   Q   When you say the effects, practice effects are not,

25   forget the term --

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1   A   Uniform.

2   Q   Uniform?

3   A   Yeah.

4   Q   Do you mean by that that they can go up or down or do you

5   mean by that that there are other variables of play that have

6   nothing to do with practice effects that may --

7   A   Exactly.

8   Q   -- elevate or decrease the score?

9   A   Yes. What I mean to say is that the overall effect is

10   not necessarily uniform because there are other factors at

11   play or may enhance or diminish practice effects.

12   Q   Enhance or diminish in relation of the total score?

13   A   Exactly.

14   Q   I just want to be clear. Is the practice effect always

15   going to be an increase in score but could be offset by

16   something else?

17   A   That's exactly, yes.

18   Q   Okay.

19   A   Yes.

20   Q   All right. Any other --

21   A   Practice effect implies an increase in score but that

22   effect can be offset by other factors.

23   Q   Any other factors at play?

24   A   For example, other factors associated with the test,

25   factors associated with the testing situation with the

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1   examinee or the examiner.

2   Q   All right. So if you, if you do -- and those are all the

3   tests, right? The other ones you have raw data for?

4   A   Yes, that's correct.

5   Q   If you look at the Flynn corrected IQ scores for Nagler,

6   Drob, and Denney, you have a 69.35, 70.36, and a 78.02.

7   Right?

8   A   Yes.

9   Q   Now, do you consider those scores without reference to

10 the confidence intervals, when you're assessing intellectual

11 functioning?

12 A   No, it's practice -- best practices, according to both

13 the American Psychological Association and AAIDD, to consider

14 an IQ score in the context of the confidence interval. And

15 that's simply because an IQ score is not -- is not a static

16 score, it is really supposed to be reported within a range

17 because of the concept of error, of variability associated

18 with error. It is an estimate of the true score.

19   So we have an obtained score and we have a true

20 score. The confidence interval allows us with as much

21 certainty as possible estimate what that true score might be

22 given the variability that's created by error.

23 Q   So for example, for Dr. Denney's score of 78, if you take

24 into account the confidence interval, your chart indicates,

25 does it not, that his true score is in the range of 73.70 to

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1   82.34?

2   A   Yes, if you use the average SEM. The SEM by age is

3   actually somewhat more accurate.

4   Q   Okay. And that's the score to the far right there?

5   A   Yes, that's correct.

6   Q   And you're familiar that the DSM talks about a score of

7   approximately 75?

8   A   Yes.

9   Q   Whereas the AAIDD talks about no fixed cutoff and don't

10 mention a score number?

11 A   Approximately two standard deviations below.

12 Q   So one of the questions the Court had is: Is there a

13 score at which you don't need to worry about adaptive

14 function, or do you say well since there's no fix cutoff

15 score, according to the AAIDD, does that mean if you have a

16 score of 100 or 95, you're still in the ballpark for

17 intellectual functioning -- the intellectual functioning prong

18 and you have to do adaptive deficit analysis, or is there a

19 score at which you say we don't need to worry about that?

20 A   Well, I think you need a score and, you know, we're

21 talking about not having -- you know, we're talking about the

22 fact that a score really is an estimate and falls within a

23 range. But I think that there still needs to be a score

24 around which you consider then moving on to consider adaptive

25 functioning.

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1   And DSM says 75. And when I look at the confidence

2   intervals that are drawn that I built around these scores with

3   the most precise, the SEM by age. For the scores that I feel

4   that I have the most confidence in, that is, Dr. Denney's

5   score, Dr. Drob's score, and Dr. Nagler's score, all of those

6   have that 75 fall within that confidence interval range.

7   For me, when I think about the relationship between

8   adaptive functioning and an IQ, it's really one of, according

9   to the AAIDD, thinking of them as equivalent measures to be

10   considered. And I think that they inform each other and have

11   a relationship to each other. So, in some ways they act as a

12   check or a balance on each other.

13   In the DSM, the DSM talks about making -- using

14   adaptive functioning in conjunction with IQ so as to make an

15   accurate diagnosis as possible, that is to say that we don't

16   want to be in a situation where we create false positives in

17   the diagnosis. Diagnosing someone who doesn't actually need

18   criteria. We don't want to be in a situation where we are

19   creating false negatives, not diagnosing someone that should

20   be.

21   And the DSM uses adaptive functioning in order to --

22   to put that check on IQ, that is to say someone who has very

23   good adaptive functioning but has a low IQ score should not be

24   considered to have intellectual disability.

25   And because it's a disorder of functioning, I think

1   that you need to have a score by which you then -- in the IQ,

2   that 75 being in the range of the SEM, that you then --

3   can then turn to the adaptive functioning to look at how this

4   person is functioning in the real world.

5   Q   And in this case, in reaching your own conclusion that

6   Mr. Wilson was intellectually disabled, did you -- did you

7   yourself take into account his adaptive deficits in assessing

8   prong one?

9   A   Yes, I did. Yes, I did.

10   Q   And how, if they do, the results of your

11   neuropsychological testing factor into prong one?

12   A   Yes. So I looked at all the data that was available to

13   me with a focus on his educational records in addition to that

14   that I also collected through my own testing. The --

15   there was numerous -- or numerous indications in the records

16   that I reviewed of deficits particularly in the area of

17   communication and in functional academic skills.

18   This was also demonstrated in the testing that I did

19   with achievement testing that indicated significantly impaired

20   academic skills across the board as well as in his

21   communication skills, both with me informally in terms of my

22   need to repeat questions to him, his lack of understanding

23   some of the instructions that I gave and my need to break

24   information down to simplify it for him.

25   In addition, my testing supports deficits that are

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1   broader in the areas of executive functioning, particularly

2   short term memory as well as some verbal areas.

3   Q   And then lastly, how do you -- how -- if you were able to

4   determine this, how are you able to say that the deficits that

5   you were seeing and the IQ score were not just a learning

6   disability?

7   A   Well, a learning disability is a specific deficit in an

8   academic area. So, for example, in reading or in mathematics

9   or in written expression, in the DSM-IV definition of a

10   learning disability, it discusses the specific deficit in an

11   academic domain without accompanying intellectual or adaptive

12   deficits.

13   The -- it is essentially -- a learning disability is

14   essentially a disorder of exclusion. You have a specific what

15   they call unexpected deficit in a learning area without

16   associated deficits. And that's a very different

17   conceptualization than that of an intellectual disability

18   where you have deficits and intellectual functioning broader

19   deficits across multiple domains, including academics,

20   including communication skills and other areas. And the

21   deficits that you see in the academic area in someone with an

22   intellectual disability are not unexpected; they're expected

23   given the deficits in other key domains.

24   Q   Does Mr. Wilson have such deficits?

25   A   Yes, I believe that he does.

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James – Direct/Burt

1   Q   Lastly let me ask you about this, because I'm sure it's

2   going to come up. Did you make an error in the Davis case in

3   terms of the Flynn effect computation?

4   A   Yes, I did.

5   Q   And what was it?

6   A   When I calculated the corrected scores in the Davis case,

7   I used the year of publication of the Wechsler scales and not

8   the year of norming. And the correct way of calculating the

9   corrected scores is to use the year of norming, which usually

10   is about two years prior to the date of publication.

11   MR. BURT: That's all I have. Thank you.

12   THE COURT: Cross-examination.

13   MS. COHEN: Thank you, your Honor.

14   CROSS-EXAMINATION

15   BY MS. COHEN:

16   Q   So Dr. James, before we get into all these IQ scores

17   again, let me just go back a little bit. In terms of your

18   forensic work, you testified -- when I asked you on voir dire,

19   the first time you testified was in the Davis case in '09.

20   Correct?

21   A   Yes, that's correct.

22   Q   And that was about the time you started getting into

23   doing forensic work. Right?

24   A   That's correct.

25   Q   And in that case you were specifically asked to interpret

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1   records. Correct?

2   A   That is correct.

3   Q   And to make some sense of the records. Right?

4   A   That's correct.

5   Q   And it was you in that case who actually went to the

6   public defender and said, I think there's an intellectual

7   disability here. Correct?

8   A   That's correct.

9   Q   And you brought that, as I said, to the public defender's

10 attention. Correct?

11 A   That's correct.

12 Q   But in this case -- or in the Davis case, Mr. Burt was

13 also involved in that case. Correct?

14 A   That's correct.

15 Q   And Dr. Olley testified in that case as well. Correct?

16 A   That's correct.

17 Q   Dr. Shapiro. Correct?

18 A   That's correct.

19 Q   Now, the case here is a little bit different than the

20 Davis case, right, because here you were actually recruited

21 here for an Atkins case based on the Davis case. Correct?

22 A   Yes.

23 Q   And you were recruited to be the expert in basically the

24 IQ part of the analysis. Correct?

25 A   I was asked to review the records again, as I did in

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1   Davis, and to determine whether or not neuropsychological

2   testing was warranted.

3   Q   Okay. And at that time there was already a decision to

4   go forward with an Atkins claim. Correct?

5   A   Yes.

6   Q   Now, after Davis, in 2009, you really began building a

7   little bit of your forensic work. Correct?

8   A   That's correct.

9   Q   And that business of forensic work has been exclusively

10 for the defense. Correct?

11 A   That's correct.

12 Q   And in fact, in 2010, you started giving presentations in

13 this area. Correct?

14 A   That's correct.

15 Q   And in fact, in 2010, you gave a presentation entitled

16 "Neuropsychology 101: What Every Defense Attorney Should

17 Know." Correct?

18 A   That's correct.

19 Q   And in 2011 you did another presentation. Right?

20 A   That's correct.

21 Q   And that was the seminar for the Federal Defenders?

22 A   Yes.

23 Q   And that was entitled "The Many Uses of Neuropsychology."

24 Correct?

25 A   That's correct.

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1   Q   And these presentations are basically getting your name

2   out to the defense bar. Correct?

3   A   I was asked to do those presentations and they involved

4   talking about the kinds of things that I do on a daily basis

5   as a neuropsychologist, giving definitions of

6   neuropsychological terms and some of the work that I do.

7   Q   And in fact in those, I don't have --

8   A   I didn't solicit them.

9   Q   I don't have the 2011 presentation because that was in

10   your updated resume, on your CV, but in the 2010 presentation

11   you gave four case studies. Correct?

12   A   That's correct.

13   Q   And these were cases that you've been involved with.

14   Right?

15   A   That's correct.

16   Q   One of them was the Davis case. Right?

17   A   That's correct.

18   Q   One of them was a competency case. Correct?

19   A   That's correct.

20   Q   One of them was a sentencing issue?

21   A   Yes.

22   Q   And the other one, I think, involved a sex offender, an

23   alternative punishment. I believe?

24   A   Yes. I didn't evaluate.

25   Q   Okay. But basically these presentations you're giving

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1   ideas of things that defense attorneys should look for.

2   Correct?

3   A   Can you clarify the question in terms of things that

4   defense attorneys should look for.

5   Q   Well, things that defense attorneys should know so that

6   they can figure out ways to help their clients. Correct?

7   A   That's correct.

8   Q   All right. Now, let's talk about a little bit about what

9   mental retardation is. We can agree that someone with mental

10 retardation has to have an IQ score of two standard deviations

11 below the mean. Correct?

12 A   Approximately two standard deviations below the mean.

13 Q   And that is standard, according to the DSM, of 70 or

14 below. Correct?

15 A   It's approximately two standard deviations below the

16 means. So there is no fixed cutoff score.

17 Q   Right. I mean, we can go down to a four, but we could go

18 all the way -- I don't think it's possible to get a zero, but

19 if it was that would be included. Correct?

20 A   That's correct.

21 Q   And obviously -- and then of course we have the adaptive

22 functioning prong. Right?

23 A   That's correct.

24 Q   And the onset before age 14. Correct?

25 A   That's correct.

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1   Q   Now, let me just clear up something we were just

2   talking -- you were just talking, sorry, about on direct

3   examination. With respect to, when you got into the

4   confidence interval --

5   A   That's correct.

6   Q   -- you talked about, on direct, the fact that the

7   confidence interval, the band, right?

8   A   Mm-hmm.

9   Q   Is a measurement of where the true -- the true IQ is.

10 Correct?

11 A   That's right.

12 Q   Because IQ is really an estimate, I mean these tests are

13 an estimate of what our true IQ is. Correct?

14 A   That is correct.

15 Q   And as you said in your report, every IQ test gets better

16 and better at measuring IQ?

17 A   Mm-hmm. Yes, it does.

18 Q   And I think you defined that as something called G?

19 Well, not you, but intelligence is something called G?

20 A   The general mental ability.

21 Q   Right. And so the IQ scores get at what is that true

22 score. Right?

23 A   They try to estimate as best as possible that true score.

24 Q   Right. And the confidence intervals, the significance of

25 that, to you, of course, is that, hey, since this is an

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1   estimate, we might be a little bit below. Right?

2   A   Mm-hmm.

3   Q   But we also might be a little bit of both?

4   A   Yes.

5   Q   And the probabilities of being a little below or a little

6   above are the same. Correct?

7   A   Yes.

8   Q   Now, once we apply that confidence interval, though,

9   that's the range. Right? In other words, if the confidence

10   interval, say we have a score of 80, correct, and

11   approximately the confidence interval brings us down to a

12   seventy -- could bring us down to a 75, right, could bring us

13   up to an 85?

14   A   Right.

15   Q   But if we do that, right -- and let's say somehow -- or

16   according to you, you'd say, you know what, we're going to

17   look at the 75, not the 85. Let's just hypothetically say,

18   because really it's equal, it could go either way, but let's

19   just say we're looking at the 75. That's it. Right? That's

20   the lowest in that estimate. Correct?

21   A   In that particular example you're giving me, yes.

22   Q   Right. So that, by definition, would not meet the

23   definition of mental retardation. Correct?

24   A   It definitely could. Because what we're looking at for

25   the -- the reason that there's that five-point allowance in

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1   the DSM, is because that's an average, average SEM, that five.

2   So what we know about SEM is that it varies depending on the

3   test, it varies depending on the age, and it varies depending

4   on the subgroup.

5   So while that five is there, that five is an

6   average. So when you build the confidence interval, as I have

7   built around these scores, you're getting a more accurate

8   estimation of that SEM based on age, because that's one of the

9   variables by which that confidence interval -- it's one of the

10 varying variables when we look at the SEM.

11   So when we look at that -- so when those confidence

12 intervals that I've built there, those are the most precise

13 that can be possible, they're not -- they're not the average

14 SEM, because that's just an average. They're really the

15 accurate SEM by age given the test.

16   So when you look at those confidence intervals,

17 you're looking at the numbers contained in those confidence

18 intervals, including the 75.

19 Q   All right. So let me get this straight. You're saying

20 that if we have a score of 80, right?

21 A   Mm-hmm.

22 Q   And we apply the band, if the band goes so far as down to

23 75, you're going to consider that in the 70? I mean, how do

24 you apply the confidence interval twice?

25 A   No, you're applying it once. And in that particular

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1   example that you're giving, that 75 is on the lower end.

2   Another test that you might give might have the 75 on the

3   higher end. Like that 75 can be included anywhere in that

4   confidence interval.

5   Q   Okay. So what you're saying, the confidence interval

6   gives us the highest it probably would go and the lowest it

7   would probably go. Correct?

8   A   Based on the 95 percent.

9   Q   Right. And if the lowest it could go is 75, under the

10   DSM that is not a score of 70 or below. Correct?

11   A   That is not the score of 70 or below. However, when

12   you --

13   Q   Thank you. That's my question.

14   A   -- consider the AAIDD, the AAIDD says approximately. So,

15   that approximately you can still consider --

16   THE COURT: You could -- excuse me.

17   THE WITNESS: Yeah.

18   THE COURT: Please answer the question. If there's

19   something more that counsel for the defense would like to ask

20   you about that, he's at liberty to do so on redirect. So

21   don't volunteer something that hasn't been asked.

22   THE WITNESS: Yes, sir.

23   THE COURT: I'd appreciate it.

24   Go ahead.

25   Q   Okay. So, again, we're not talking about the AAIDD for

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1   the moment, we're just talking about the definition of mental

2   retardation which you indicate in your report is 70 or below.

3   Correct?

4   A   Yes.

5   Q   Okay. Now, mental retardation, another significant

6   aspect of it, really separates somebody who has mild

7   intellectual disability or even more severe, but it really

8   goes into their ability to think abstractedly as one big

9   component. Correct?

10 A   That is correct.

11 Q   To understand complex ideas. Correct?

12 A   That is correct.

13 Q   To reason. Right?

14 A   That is correct.

15 Q   Problem solving. Right?

16 A   That is correct.

17 Q   And those are all the essence of intelligence. Right?

18 A   That is correct.

19 Q   And these IQ tests, the subtests try to get at those

20 concepts. Correct? Actually let me rephrase, it's not in a

21 good word.

22   They try to give a good estimate of those concepts.

23 Correct?

24 A   Individual subtests don't do that. That's why you --

25 that's why the full scale IQ is the best estimate overall.

1   Because individual subtests get at different kinds of skills.

2   Q   Right. Some subtests focus more on abstract thinking.

3   Correct?

4   A   Some do --

5   Q   Some --

6   A   -- as a component, yes.

7   Q   Some subtests focus more on concrete -- concrete

8   thinking. Correct?

9   A   I wouldn't say focuses on as if that's the intent of

10   measurement. Like I don't know of any subtests where the

11   intent is to measure concrete thinking.

12   Q   Well, you recall your testimony in the Davis case.

13   Correct?

14   A   Yes.

15   Q   And Mr. Davis in that case, one of the things that you

16   focused on was the fact that Mr. Davis lacked the ability

17   to -- or lacked abstract thinking. Correct?

18   A   That's correct.

19   Q   He was much better on concrete facts or concrete

20   thinking. Correct?

21   A   That's correct.

22   Q   And if fact, you looked at specific subtests that measure

23   that. Right?

24   A   That's correct.

25   Q   In fact, in your testimony you specifically looked at

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1   digit span. Right?

2   A   That's correct.

3   Q   And you testified that digit span measures concrete

4   thinking. Correct?

5   A   No. Digit -- Can you show me where I said that digit

6   span measures concrete thinking?

7   Q   Sure.

8   Question, this is on page 13 of the Davis case. The

9   testimony was March 31st, 2009. We have -- I don't think

10   there's going to be a lot of testimony read here, like there

11   was with Dr. Olley, if the Court needs a copy though, we do

12   have a copy of this transcript. Unless your Honor would like

13   a copy right now?

14   THE COURT: Do you have a copy?

15   MS. COHEN: Yes.

16   Q   Okay. So about halfway down on page 13.

17   "QUESTION: --

18   THE COURT: This is on direct or --

19   MS. COHEN: This is on direct. Yes, Your Honor.

20   THE COURT: All right.

21   MS. COHEN: "QUESTION: Describe some of what you

22   found.

23   "ANSWER: Some of what I found? Over time what I

24   found was that Mr. Davis demonstrated stronger performance on

25   subtests like digit span, which was, for example, is really a

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1   measure of auditory attention and involves basically what you

2   would do if you were giving someone a phone number to

3   remember. It's considered a relatively concrete test and it

4   is a weaker measurement of general intellectual functioning."

5   Do you recall that testimony?

6   A   I do.

7   Q   So in fact there are subtests that focus more on concrete

8   tests. Correct?

9   A   I would say that what I said was that digit span, the

10 intent of digit span is to measure auditory processing, to

11 measure auditory attention and it is a relatively concrete

12 test. It's not -- the intent of digit span is not to measure

13 concrete thinking. Its intent is to measure auditory memory

14 and attention and it is a relatively concrete task in

15 comparison to others.

16 Q   Right. In fact, you specifically talked in Davis about

17 the fact that it's relatively concrete as compared to such

18 subtests like verbal similarities. Correct?

19 A   That is correct.

20 Q   And matrix reasoning. Correct?

21 A   That is correct.

22 Q   Those were two that you gave examples of that measured

23 abstract thinking. Right?

24 A   That's correct.

25 Q   And the whole reason in Davis, one of your main arguments

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1   is that Mr. Davis performed poorly on those abstract tests as

2   compared to the concrete ones. Correct?

3   A   That is correct.

4   Q   Now, one of the other things -- and again, I'm sorry,

5   just to bring us back to the overall topic, we're talking

6   about what it really means to be mentally retarded or

7   intellectually disabled.

8   You talked -- we already mentioned that the best

9   estimate of your intelligence is an IQ test. Correct?

10   A   Yes.

11   Q   And that -- by the way, how many IQ tests have you --

12   approximately have you given in your career?

13   A   700.

14   Q   Now, important, as you know from giving an IQ test,

15   besides the number, another important aspect of it is your

16   clinical judgment. Correct?

17   A   That is correct.

18   Q   And the best person to assess -- to assess what the

19   intelligence is of an individual, is a person administering

20   that test. Correct?

21   A   Yes.

22   Q   And the reason is that the person administering the test

23   can't assess for a variety of different things that can affect

24   the score. Correct?

25   A   That is correct.

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1   Q   They can assess if the person is not trying. Right?

2   A   That is correct.

3   Q   They can assess if the person struggles in some areas

4   more than others?

5   A   That is correct.

6   Q   And obviously the scores would reflect that in some

7   sense. Right?

8   A   Yes.

9   Q   But there's nothing like actually seeing how that person

10   answers a question, that's something that is helpful. Right?

11   A   That is correct.

12   Q   Now, in this case you were retained to evaluate

13   Mr. Wilson's IQ. Correct? We've established that?

14   A   I was retained to determine if any additional

15   neuropsychological testing was required.

16   Q   Right. Now you didn't give an IQ test here. Correct?

17   A   No, I didn't.

18   Q   And there was nothing that prevented you from giving an

19   IQ test. Correct?

20   A   I considered giving an IQ test but I was also provided

21   with all of the previous IQs that Mr. Wilson had had. And as

22   I previously stated, he -- at the point of me seeing him, he

23   would have received -- he would have undergone eight

24   iterations of the Wechsler scales. And my concern about

25   giving a ninth test would be that, as we've discussed, the

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1   numerous sources of error that would be present given that

2   he's had multiple exposures to these tests previously.

3   Q   Okay. Now, wait a minute. Giving him another test, and

4   you're the one giving him another test?

5   A   Mm-hmm.

6   Q   You can check your work better than any of these tests.

7   Correct?

8   A   I can.

9   Q   Right. So the issue isn't error, it's practice effect is

10 actually what you're saying. Correct?

11 A   Error in -- there are many different sources of error.

12 Practice effect is one of them.

13 Q   But if you are administering the test, you yourself,

14 who's here as an expert and who has given this test 700 times,

15 the only error you would have really been concerned about

16 would be practice effect. Correct?

17 A   It could be one source of error. I mean, there are other

18 sources of error in terms of examinee error --

19 Q   Right.

20 A   -- and also the fact that, again, I was talking about

21 error introduced by -- an error introduced by variable

22 test-retest intervals or other sources of errors.

23 Q   Okay. So examinee error, the test taker. Right?

24 A   Mm-hmm.

25 Q   Would be lack of effort. Right?

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 1   A     Fatigue.

 2   Q     Fatigue, right.  All of those things come into play?

 3   A     Yes.

 4   Q     But, there's no other error from a test taker.  Right?

 5   A     There are multiple sources of error, those are two

 6   examples.

 7   Q     Okay.  So, I mean, if you get a high score, right, and a

 8   lower score, the high score is not going to be an error.

 9   Right?  I mean, putting aside practice effects, putting aside

10   being tired -- well, no, don't put aside -- just putting aside

11   practice effect, the higher score, you can't fake being good.

12   Correct?

13   A     You can, but it's less likely.  You can -- you can fake

14   being good in certain senses but in order to fake being good I

15   think in the sense that you're talking about is performed

16   better on something that you're capable --

17   Q     I mean, the only possible way would be to cheat.

18   Correct?

19   A     Mm-hmm.

20   Q     Okay.  So that's not an issue.  Right?

21   A     Right.

22   Q     I mean, the only issue is lack of effort or being tired

23   or maybe you didn't eat.  Right?

24   A     Mm-hmm.

25   Q     But as a test administrator, you're able to evaluate
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1   that. Correct?

2   A   That is correct.

3   Q   You can ask the person if -- what they ate before they

4   came to the test. Right?

5   A   That's correct.

6   Q   You can ask them how well they slept. Correct?

7   A   That is correct.

8   Q   And you can look at a person and see, think, make an

9   evaluation as whether this person seems tired. Right?

10   A   That is correct.

11   Q   You can also make an evaluation of whether they're giving

12   their full effort. Right?

13   A   That is correct.

14   Q   And you said in your report that the reason you didn't

15   give an IQ test, besides the reasons you just said, is that

16   you didn't think it would be useful. Correct?

17   A   That is correct.

18   Q   Or that it would be needed. Right?

19   A   That's correct.

20   Q   But there would have been no harm in giving the IQ test.

21   Correct?

22   A   Harm in what sense?

23   Q   Well, I mean, if you gave an IQ test, right, and it's --

24   Mr. Wilson seemed off to you, hypothetically. That would have

25   been reflected in your report. Correct?

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1   A   That's true.

2   Q   So you could have said hey, I gave an IQ test but I'm not

3   going to put weight in it for a variety of reasons. Correct?

4   A   Right.

5   Q   Okay. Now -- and by the way, Mr. Wilson's last test was

6   almost ten years ago, wasn't it?

7   A   That is correct.

8   Q   And as time goes on, practice effects become less and

9   less of a problem. Correct?

10   A   No, that's not correct. We don't -- we don't know how

11   long -- there's no research that indicates that there is an

12   optimal time period in which practice effects stop being

13   evidence. In fact, it's the opposite. There are shorter

14   intervals in which practice effects can be noticed and then

15   there are longer intervals, some research as long as 13 years,

16   where practice effects are notable.

17   Q   So if you give an IQ test in one day, right, and you give

18   that same IQ test to a person three days later --

19   A   Mm-hmm.

20   Q   -- logically the practice effects would be more evident

21   in that test. Correct?

22   A   Yes.

23   Q   Now -- and the WAIS-IV, by the way, is the test, the

24   current test. Correct?

25   A   That is correct.

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1   Q   And as you said in your report, each test gets better and

2   better at measuring IQ. Right?

3   A   That is correct.

4   Q   And so the WAIS-IV is the best measurement we have out

5   there right now. Right?

6   A   At this point, yes.

7   Q   And the WAIS-IV is actually, according to the literature,

8   a little bit harder than the other tests. Correct?

9   A   I'm not aware literature that says it's harder.

10   Q   Okay. Now let's move to one area, again, before we get

11   into the IQ scores. You talked a little bit on direct

12   examination about the difference between learning disabilities

13   and mental retardation. Correct?

14   A   That is correct.

15   Q   Now, one of the things you also say about mental

16   retardation is that it is pervasive. Right?

17   A   That's correct.

18   Q   So that when you see a score, the subtests should be all

19   deficient across the board basically. Correct?

20   A   I don't think -- that's not a criteria for mental

21   retardation that I'm aware of.

22   Q   Okay. Well, you talked about the fact that the

23   difference between a learning disability and mental

24   retardation is that a score -- the person with a learning

25   disability gets one of the scores, particularly the

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1   learning -- the verbal score, is very -- there's a big

2   discrepancy between the two. Correct?

3   A   Again, that's not a criteria for determining a learning

4   disability. Not according to the DSM.

5   Q   Okay. Now, you testified that one of the scores would

6   show an unexpected underachievement. Correct?

7   A   Yes, on an academic achievement test.

8   Q   Okay. But you can't -- that's not something you're

9   saying you could see in an IQ test?

10   A   No, because a learning disorder reflects academic

11   achievement. That's the definition in the DSM-IV. It's a

12   specific deficit in academic achievement.

13   Q   Okay.

14   A   That is to say, reading, spelling, written expression,

15   math.

16   Q   Okay. But there are, by the way, specific subtests in

17   the IQ scores that measure -- that has some aspect of academic

18   in it. Correct?

19   A   The only one that I know is arithmetic, and it's not

20   designed to measure academic prowesses, it's on the working

21   memory index of the scale.

22   Q   But clearly something like information, right, taps into

23   something -- things that you've learned. Correct?

24   A   Yes.

25   Q   Right. Like, for example, who is Cleopatra. Right?

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1   A   That is correct. Factual knowledge about the world.

2   Q   And those -- that factual knowledge about the world is

3   something that someone might learn in school. Correct?

4   A   That is correct.

5   Q   Now, they can also learn it at home. Right?

6   A   That is correct.

7   Q   I mean, if they've got parents who read to them every

8   night, they're going to learn these facts. Right?

9   A   That is correct.

10   Q   But if someone from -- who didn't have that going on at

11   home, they would have to look to their education. Correct?

12   A   Yes. And also the type of subtest you're describing,

13   information, it's one that's influenced by education but just

14   also one -- what one picks up from their environment; that is

15   to say, that might be from someone reading to them at home,

16   but it also is just a function of living in the world and

17   walking around and talking to people. And there's information

18   that one picks up just in that way.

19   Q   Right. But that also can depend on the environment

20   you're in. Correct?

21   A   Oh, certainly it would be affected by the environment.

22   Q   Right. I mean, if you're in an environment where people

23   aren't talking about Cleopatra and continents and things like

24   that, you wouldn't pick it up. Correct?

25   A   That is correct.

James – Cross/Cohen

1   Q   Now, one of the other subtests, vocabulary, that's also

2   tied to reading. Correct?

3   A   It can be, although when you diagnose someone with a

4   specific learning disability in reading, that can be someone

5   who has an excellent vocabulary but can't read because they

6   can't decode.

7   Q   Right, but --

8   A   So they're related but they're not the same thing.

9   Q   And the reason that they're related is because reading

10   increases your vocabulary. Correct?

11   A   Yes.

12   Q   And academics help your vocabulary. Correct?

13   A   Yes, they do.

14   Q   So, let's just talk about what you think, then, of the

15   learning disability. You have previously testified that

16   some -- what separates someone with a learning disability from

17   someone with mental retardation is that the person with a

18   learning disability has a problem on specific tests of

19   academic performance. Right?

20   A   That is correct.

21   Q   As compared to somebody who doesn't have the ability

22   to -- or that same person who has that problem would have a

23   good ability to comprehend complex ideas. Right? And think

24   abstractly. Right?

25   A   That's correct.

James – Cross/Cohen

1   Q   And reason. Correct?

2   A   That's correct. So what differs the two is that a person

3   with a learning disability has a specific academic deficit but

4   does not have intellectual and adaptive deficits.

5   Q   Right. Okay. But your testimony is that an IQ score

6   wouldn't show a learning disability. Is that what your

7   testimony is?

8   A   That is correct. Because there is no -- because in

9   defining a learning disability, a learning disability is

10   defined -- it's a sorter of exclusion. It's a learning

11   problem that is happening in an academic area that is not

12   reflected by, that is not caused by, specifically not caused

13   by a sensory disorder, a motor disorder; that is, a person can

14   see, they can hear and they don't have broader intellectual

15   deficits. So when I say it's unexpected, it's unexpected

16   because they have all of these other capacities and

17   capabilities but they still can't read. They still can't do

18   math.

19   Q   Okay. Now, this is another -- this was an issue in the

20   Davis case as well. Correct?

21   A   That is correct.

22   Q   And do you recall in the Davis case you defined learning

23   disability. Do you remember that?

24   A   That is correct, yes.

25   Q   And you were -- the question you were asked on -- I'm on

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1   page 15 of the transcript.

2   "QUESTION: Now, before I ask you questions about

3   your specific findings there, let me ask you a generalized

4   question. If you could, define for the Court what the

5   differences are and what the connection may be between mental

6   retardation and learning disabilities.

7   "ANSWER: Right. A learning disability is a

8   specific deficit in one or more academic areas, for example,

9   reading or math in the absence of more generalized deficits in

10 intellectual function and adaptive functioning.

11   And the classical mode of learning disabilities is

12 really this idea of a discrepancy between, one, and it's

13 predicated on the idea, it's intuitive, that one has a

14 generally fairly good intellectual ability in terms of their

15 ability to be able to comprehend complex ideas and think

16 abstractly and reason and problem solve, and their ability on

17 specific tests of academic performance such as a reading test.

18   "In common parlance" -- and this is now on page

19 16 -- "in learning disabilities, it's really referred to as an

20 unexpected underachievement because the achievement scores are

21 surprising in light of the cognitive ability. As one's IQ

22 score decreases, then the unexpectedness of that learning

23 failure decreases as well."

24   Do you recall that testimony?

25 A   That's correct.

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1   Q   Okay. And you were also asked: "So if I'm right in

2   this, when you say something is unexpected is because one

3   doesn't anticipate that there is going to be a wide disparity

4   between the intellectual ability on the one hand and the

5   performance on the other, correct?" That was the question.

6   And your answer was: "Right. Right. So the

7   underachievement is surprising, but when your IQ score drop,

8   then -- or drops you probably said, it's typo -- "then it's no

9   longer surprising that you're underachieving across multiple

10   areas."

11   Do you recall that testimony?

12   A   I do.

13   Q   Okay. So what you're saying is that you're talking about

14   achievement tests?

15   A   Yes.

16   Q   Is that correct?

17   A   That is -- that's how a learning disability is defined by

18   academic achievement.

19   Q   Right. As opposed to -- and you compare that to an IQ

20   score?

21   A   Yes.

22   Q   Okay. But the same application -- since there are

23   specific tests within an IQ score that measure academic and

24   verbal versus performance, we can see that same discrepancy.

25   Correct?

James – Cross/Cohen

1   A   I'm not sure I understand your question because -- can

2   you repeat your question or reword it?

3   Q   Sure.

4   Isn't it -- when you have a discrepancy between the

5   performance and the verbal of let's say 15 points, that's

6   unusual. Correct?

7   A   That's a significant discrepancy. Whether it's unusual

8   or not requires another calculation.

9   Q   Right, okay. So it's significant. Right?

10   And you -- that's significant because generally your

11   intellect, your entire intellect should be similar. Right?

12   That the performance and IQ shouldn't be that far apart.

13   Right?

14   A   That is correct.

15   Q   And the reason why that's significant is because the

16   discrepancy suggests that there might be something else going

17   on that cause this lower score. Correct?

18   A   There are different kinds of discrepancies, and that's

19   what I'm trying to clarify, is that you can have a

20   statistically significant discrepancy between your verbal and

21   your performance and have that not be unusual, unusual because

22   there is variability in verbal and performance scores across

23   people of different populations.

24   When you have an unusual or marked discrepancy,

25   we're referring to the base rate, the number of people in the

James – Cross/Cohen

1 population that have that marked discrepancy.

2 Q   Okay.

3 A   So I'm not sure -- I'm just not sure what -- what type of

4 discrepancy you're referring to.

5 Q   Okay, give me one moment.

6   You're familiar with Assessing Adolescent and Adult

7 Intelligence, Third Edition, by Alan S. Kaufman?

8 A   Yes, I am.

9 Q   In fact, that's an exhibit in this case that has been

10 referred to many times. It is Exhibit B?

11 A   That's correct.

12 Q   If you turn to that article within your binder, I can

13 read it aloud to you. On the page 318 of that article, that's

14 within Chapter 9, it says specific -- under the heading of

15 "Learning Disabilities."

16   THE COURT: I'm sorry, what page is it on?

17   MS. COHEN: Sure, your Honor. I'm on Assessing

18 Adolescent and Adult Intelligence. It's the fifth tab back.

19 And within that tab I'm on page 318.

20 A   Yes.

21 Q   Okay. And in the second -- under "Learning

22 Disabilities," the second column, the column on the right, the

23 paragraph starts with: "As there are three separate IQs and

24 four factors," that paragraph. Do you see that?

25 A   Yes.

James - Cross/Cohen

1   Q   And you go to the next sentence. "In children and

2   adults, for example, individuals with learning disabilities

3   often display Performance greater than Verbal profiles on

4   Wechsler instruments. Across many studies of adolescents and

5   adults with various learning disabilities, a consistent

6   pattern of a higher Performance IQ than Verbal IQ of about 7

7   to 19 points is present."

8   Do you see that?

9   A   Yes, that's correct.

10   Q   And if you go down to the next paragraph you see: "The

11   Performance greater than the Verbal pattern noted for

12   individuals with learning disabilities is not that surprising

13   because the Verbal tasks on Wechsler's scales are heavily

14   achievement dependent. Several Verbal subtests tap

15   information taken directly from school-learned knowledge. By

16   definition individuals with a learning disability are not good

17   achievers. Thus, the Performance greater than Verbal pattern

18   in individuals with learning disabilities may be a reflection

19   of their poor crystallized knowledge, and, more specifically,

20   of their failure to learn in school."

21   Do you agree with that testimony? I'm sorry, to

22   that -- do you agree with that analysis by Dr. Kaufman?

23   A   I do.

24   Q   And isn't that quite the opposite of what you were

25   saying?

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James – Cross/Cohen

1   A   No, actually. Because it says that that's a pattern that

2   is often seen in learning disabilities. But learning

3   disabilities are heterogeneous and the kind of learning

4   disability that is being described in that verbal performance

5   split is typically a reading disability because reading is

6   related to vocabulary.

7   But learning disabilities are heterogeneous. There

8   are learning disabilities in reading, there are learning

9   disabilities in math, there are learning disabilities in

10   written expression. There's no one pattern of IQ performance

11   that defines learning disability. And a learning disability

12   isn't defined by an IQ pattern. A learning disability is

13   defined by a specific deficit in that academic area.

14   I've seen children that I've diagnosed with a

15   learning disability who don't have verbal performance IQ

16   splits. And in fact, the learning disability field has moved

17   beyond a discrepancy formula in determining a learning

18   disability.

19   Q   Okay. But my question before was that an IQ test, if

20   there is a discrepancy between the scores, that is often

21   indicative of a learning disability. That was my question.

22   And your answer was no, that's when you compare an

23   achievement test to an IQ score. Do you recall that?

24   A   Yes.

25   Q   Okay. But this -- what I read to you from Dr. Kaufman

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James - Cross/Cohen

1   states that you can look at an IQ test and see whether it's

2   possible that this person has a learning disability. Correct?

3   A   You can, but it isn't what -- how you define a learning

4   disability. So you can look at a verbal IQ performance split

5   and you can see lower verbal scores than performance scores,

6   and that might be an indicator to you that there might be

7   something going on in the verbal domain that with achievement

8   testing you can -- you can achieve more clarity. But the

9   learning disability always goes back to the achievement. It's

10   not -- it's not -- it's only about IQ in terms of IQ as an

11   exclusion criteria. It's not about IQ in terms of the

12   definition of a learning disability.

13   Q   Okay. Well, let's -- we're going to get to your

14   achievement testing a little later on, but let's stick with IQ

15   for the moment.

16   When I asked you that -- there are -- I said there

17   are a few subtests that actually tests for academics, you

18   disagreed initially. Correct?

19   A   They don't test for academics, that's not the purpose of

20   the subtest. The subtest, like for example, the vocabulary is

21   not a subtest that one would give in order to infer one's

22   academic ability. Its a subtest, part of a larger measure,

23   that you then consider along with achievement testing and look

24   at that achievement testing as well as this -- as well as

25   other testing that you might have to make that determination.

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James - Cross/Cohen

 1   So the purpose of vocabulary is not to assess one's reading

 2   ability.

 3   Q   Okay. That wasn't my question. My question is: In the

 4   subtest, the subtests are reflected by a lack of learning.

 5   That can affect your subtest score. Correct?

 6   A   Yes.

 7   Q   And it can attempt -- we're talking about information.

 8   Right?

 9   A   Mm-hmm.

10   Q   We talked about vocabulary.

11   A   Yes.

12   Q   Right?

13   A   Yes.

14   Q   And in fact, math, arithmetic is also affected by one's

15   academic schooling. Right?

16   A   It can be. And it also can be affected by attention and

17   working memory. That's actually the primary aspect of

18   arithmetic, given that it loads on working memory.

19   Q   If you give an IQ to someone who lived in a cave for ten

20   years, right, they think they were born in a cave and they get

21   out of the cave and you give them an IQ test, they're not

22   going to be able to do the arithmetic part. Correct?

23   A   I have no idea, but I don't think so.

24   Q   And they wouldn't score well on it. Right? And if you

25   then put that same person into school and test them ten years

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Official Court Reporter

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1   later, they're likely going to improve on that test. Correct?

2   A   I would hope so.

3   Q   Okay. So what Dr. Kaufman is saying is that we can

4   detect learning disabilities in IQ tests. Correct?

5   A   I think what he's saying is that there are patterns of

6   verbal performance discrepancies. There are patterns in IQ

7   tests that are not uncommon in people with learning

8   disabilities. And I think here he's referring again to a

9   reading disability because I don't know how you would

10 determine a disorder of written expression from vocabulary or

11 arithmetic.

12   So there are patterns of IQ scores that can be

13 associated with a specific learning disability, but the

14 specific learning disability itself cannot be diagnosed by an

15 IQ or an IQ discrepancy.

16 Q   Okay. But what we see often are individuals with

17 learning disabilities are going to have a discrepancy between

18 their performance and their verbal because the verbal is

19 often -- there are subtests that tap into knowledge taken

20 directly from school learning. Correct?

21 A   I'm sorry, can you repeat the question?

22 Q   Sure.

23   Individuals with learning disabilities often,

24 statistically shown, are going to have a discrepancy between

25 performance and verbal because the verbal subtest tapped

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1 information taken directly from school-learned knowledge.

2 Correct?

3 A   No, I don't think that's correct.

4 Q   Okay, so you disagree with Dr. Kaufman is what you're

5 saying?

6 A   I agree that -- that he says the word often and I think

7 that that's key here. You can -- and often in relation to a

8 specific type of learning disability. But there are multiple

9 types of learning disabilities. So you can have that pattern

10 but you can also not have that pattern, and I've seen that

11 clinically.

12 Q   Okay. Now, when you testified in the Davis case, with

13 respect to Mr. Davis, you testified that he did not have a

14 learning disability. Correct?

15 A   Can you show me the particular --

16 Q   Sure.

17   I'll read it to you. Page 16.

18 A   Okay.

19 Q   The question is, line 16: "Okay. Now, what does that

20 mean with respect to your examination of the records in

21 Mr. Davis's case for that which is significant in terms of

22 determining whether there is evidence of mental retardation?

23   "ANSWER: Mr. Davis shows evidence of significant

24 impairments in his intellectual functioning across multiple

25 administrations of intellectual testing. In addition, when

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1   you take a look at his strengths and weaknesses, you see a

2   profile of weaknesses in areas that are typically associated

3   with general mental ability and reasoning. You see those

4   impairments as significant and that would not be seen in an

5   individual with a learning disability."

6   That was your testimony. Do you recall that

7   testimony?

8   A   I do.

9   Q   So -- now, let's take a look at Mr. Wilson's subtest

10 scores.

11   THE COURT: Could -- I think we ought to take a ten

12 minute break and then we'll come back and do that. Is that

13 okay?

14   THE WITNESS: That's fine.

15   THE COURT: All right. Ten minutes.

16   (Recess.)

17   (Continued on the next page.)

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James - Cross/Cohen

1   THE COURT: I remind the witness that she is still

2 under oath.

3   THE WITNESS: Yes, Your Honor.

4 BY MS. COHEN:

5 Q   Dr. James, when we left off before the break, we were

6 talking about this learning disability issue. And let's

7 just -- let's clarify. I think we can agree that, as you

8 said, an IQ score is not a diagnostic tool for learning

9 disability. Is that what you were trying to say?

10 A   That is correct.

11 Q   Okay. But what the Kaufman article is saying, is that

12 the difference between the two scores is a pattern across the

13 board. Right? And that shows that it's also indicative of a

14 learning disability. Correct?

15 A   It's a pattern that you can see in IQ scores. And there

16 are times when that particular pattern is also seen in

17 learning disabilities. It's not -- I wouldn't say it's

18 indicative of a learning -- it's not diagnostically

19 indicative, because you need to look at other things,

20 particularly the person's achievement to make the diagnosis.

21   But it is -- it is a pattern that you can consider

22 along with the particular deficit and achievement.

23 Q   Okay. But Dr. Kaufman's book is not simply Dr. Kaufman's

24 opinion. Correct?

25 A   That is correct.

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James – Cross/Cohen

1   Q   I mean, this discussion in his book is based on tons of

2   studies. Correct?

3   MR. BURT: Judge, I am going to have to object to

4   this line of questioning. We've spent a lot of time on this.

5   I'd ask the Court to look at the last paragraph on page 327 of

6   this book she's quoting, which says: "On no uncertain times"

7   exactly the opposite of what --

8   THE COURT: You can ask on redirect. Go ahead.

9   MR. BURT: All right.

10   Q   This is based on studies. Correct?

11   A   I'm sorry, could you --

12   THE COURT: Can we go back --

13   MS. COHEN: Sure.

14   THE COURT: -- and just ask the question again?

15   MS. COHEN: Sure.

16   Q   Dr. Kaufman's statements that I read are based on

17   studies. Correct?

18   A   So that -- I'm sorry, based, what -- what is based on

19   studies? Do you mean the verbal performance discrepancy?

20   Q   Yes, the fact is, that shows a learning disability?

21   A   I don't know that he says that shows a -- a learning

22   disability you can -- you can't diagnosis a verbal disability

23   from a verbal performance discrepancy. So he's saying that

24   pattern is often seen in learning disabilities.

25   Q   Correct. He says, *a consistent pattern of higher*

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James - Cross/Cohen

1   *performance IQ than verbal IQ of about seven to 19 points is*

2   *present.* Right?

3   A   Yes, that's what he says.

4   Q   Okay. Now, if you go to page 320 -- actually, it starts

5   on 319, it goes to 320. Dr. Kaufman talks about all of the

6   various studies on this subject. Correct?

7   A   And where are you referring to?

8   Q   Well, before I talk specific, just generally, if you

9   eyeball page, review of research findings on the performance

10   greater than verbal profile on page 319?

11   A   Yes.

12   Q   It continues into the first column on page 320?

13   A   Yes.

14   Q   And that last paragraph on page 320 summarizes these

15   studies and it says: *Although the various studies have*

16   *generally included small samples, the available data indeed*

17   *suggest that adolescents and adults with learning*

18   *disabilities, not in college, have a decided performance*

19   *greater than verbal profile. Deficiencies on the verbal scale*

20   *are sensible, because the WAIS-R, the WAIS-III, the WISC-R and*

21   *the WISC-III verbal tests are heavily achievement oriented.*

22   *And learning disabled or illiterate adults are, by definition,*

23   *poor achievers in reading and related subject areas.*

24   Do you see that?

25   A   Yes, I do.

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James – Cross/Cohen

1   Q   So my point is that Dr. Kaufman's statements are based on

2   studies. Right?

3   A   Yes.

4   Q   Now, going on to the next section: *Clinical implications*

5   *of research findings*. Dr. Kaufman further states that

6   *implications of the Wecshler's research with children and*

7   *adults diagnosed with learning disabilities, are that the*

8   *obtained IQ's may be misleading. Low verbal IQs are likely --*

9   I'm sorry, do you see where I am?

10   A   Yes.

11   Q   Okay. *-- are likely to reflect, at least to some extent,*

12   *the poor school achievement of these individuals, along with*

13   *impaired functioning in subtests associated with a working*

14   *memory and freedom from distractibility factors. Whereas, the*

15   *performance IQ is often the best estimate of learning disabled*

16   *children and adult's intellectual ability, except for those*

17   *who attend or graduate from college despite their ability.*

18   So what Dr. Kaufman is saying there, is that if an

19   individual has a learning disability, where their verbal score

20   is much lower, that their full scale IQ could be misleading in

21   that instance. Correct?

22   A   That's correct.

23   Q   And the reason for that is because the low verbal is

24   reflecting their poor achievement in certain subtests. The

25   tests, things that tap into the learning disability problems.

James – Cross/Cohen

1   Correct?

2   A   That's correct.

3   Q   Now, let's take a look at Mr. Wilson's subtests

4   throughout the years. I think you testified about them on

5   direct examination. I put together basically a chart that had

6   all of these on them. I just thought it would be helpful for

7   everyone.

8   You're free to check to make sure, obviously, the

9   numbers are correct, but I took them from the records that

10 have already been -- that you've already been referring to.

11 And I've marked this as Government's Exhibit 99, and I'll hand

12 up copies to the Court.

13   I'm going to be using this exhibit as a

14 demonstrative. I think it would be helpful for your Honor to

15 have it together with the chart.

16   THE WITNESS: I'm sorry. Do I have a copy of this?

17   MS. COHEN: I'm sorry. I just gave it to defense.

18 I'll show you. If there is no objection, I offer this into

19 evidence, to make it more clear to the court.

20   THE COURT: And this as to the subtest scores?

21   MS. COHEN: Yes. Just to put them in so we can all

22 see what they are on the same page. We also -- I just gave

23 this to defense counsel because I just did this last night.

24 So if you want to make sure there are no errors.

25   MR. BURT: No objection subject to my cross-checking

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1   to make sure she's got it right.

2   THE COURT: Yes, subject to your cross-checking,

3   Government's Exhibit 99 is received into evidence without

4   objection.

5   (Government's Exhibit 99 received in evidence.)

6   MS. COHEN: And I can hand up a copy to the

7   witness --

8   THE COURT: Give a copy to the witness.

9   THE WITNESS: I don't have my glasses.

10   THE COURT: You can put it on the screen also,

11   whatever you wish, but we would have to set it up.

12   MS. COHEN: Everyone is looking at the same chart.

13   THE COURT: Excuse me, what happened to Mr. Stern?

14   MS. COHEN: There is he.

15   THE COURT: Okay, he's back.

16   MR. STERN: You were looking for me?

17   THE COURT: I saw you weren't there, so I was

18   wondering what happened to you.

19   That's fine.

20   (Continued on the next page.)

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James – Cross/Cohen

1   BY MS. COHEN:

2   Q   Okay. Now this chart reflects each of the IQ scores or

3   each of the IQ examiners' tests, as we said. The individual

4   subtests are named on the left. Do you see that?

5   A   That's correct.

6   Q   And I'm, again, I'm referring for the record to

7   Government Exhibit 99.

8   And Dr. Aranoff, as you discussed on direct, is a

9   little bit difficult to compare in this, right? Because she

10   didn't record her actual subtest scores?

11   A   That's correct.

12   Q   Now, I tried to put in, just to be complete, based on her

13   comments in her report as to what the tests were in terms of

14   borderline, low average, average. But I think for the

15   purposes of our discussion, we'll just talk about the other

16   scores.

17   A   I actually don't see Dr. Frank's scores here.

18   Q   I did not include Dr. Frank's scores here, because he did

19   not give a full IQ.

20   A   But we're looking at the subtests?

21   Q   We're looking at the subtests. We can bring him into it.

22   I did not include him because he didn't give all of the

23   subtests in this case, but we can certainly discuss him, as

24   well.

25   Okay. I think you basically said Dr. Frank, I mean,

James – Cross/Cohen

1   he put him in the borderline area, right?

2   A   He said mildly deficient.

3   Q   Okay.

4   A   Which corresponds to about a scale score of five or

5   below. In fact, I do believe reviewing -- that I reviewed his

6   actual scores.

7   Q   All right. But he didn't give a full subtest, so when

8   we're talking about across the board, let's just focus for now

9   on the ones that did, okay?

10   All right. So --

11   MR. BURT: Judge, before she does that, could I have

12   one moment with counsel to point out one area I've already

13   discovered, so there's no misunderstanding?

14   THE COURT: Here.

15   Do you have another set of these? It might be to

16   better to put it on the screen, so everybody in the room can

17   see it.

18   MS. COHEN: Sure.

19   BY MS. COHEN:

20   Q   We'll go through -- and counsel pointed out on digit

21   span -- I apologize. I did this late what night. I checked

22   it this morning.

23   But digit span under Abramson is actually a five and

24   not a nine. We want to make --

25   THE COURT: Abramson, digit span five. Got it.

James – Cross/Cohen

1   MS. COHEN: Okay. I'm going to put this on the

2   Elmo.

3   THE COURT: Thank you.

4   MS. COHEN: Okay. There we go.

5   THE COURT: Okay.

6   BY MS. COHEN:

7   Q   All right. Now, you testified earlier that similarities

8   is something that tests reasoning, correct?

9   A   Verbal concept.

10   Q   Verbal abstract?

11   A   Verbal concept from formation.

12   Q   Okay. But there was one of the subtests, as you agreed,

13   that you testified as to in Davis, was something that reflects

14   abstract thinking, correct?

15   A   Yes.

16   Q   Okay. And Mr. Wilson's scores --

17   MS. COHEN: Oh, and by the way, before we continue,

18   I also want to -- I have another demonstrative that I think

19   would be helpful for everyone, that I'll mark as Government

20   Exhibit 98, and I have copies of this, as well.

21   This is a conversion chart, these subtests, we have

22   been -- there's been a lot of, Your Honor, discussion in

23   court -- the subtests obviously have to be interpreted for lay

24   people. To help with that, we've put together a psychometric

25   conversion chart, which gives an idea of the percentage the

James – Cross/Cohen

1   score is in, the IQ equivalent and a description of what that

2   score means, in other words, is it mildly -- mild intellectual

3   disability, borderline, low average, average?

4   THE COURT: What's the source of that?

5   MS. COHEN: This source of this is, I mean, it's in

6   all of these books, show what the equivalent is, what the

7   percentile is. We're going to establish this with one of our

8   experts, as well. So we can offer it, subject to connection.

9   MR. BURT: Subject to connection. I don't know what

10   the source is. I don't know if it's accurate, but if they can

11   tie it up through their witness --

12   THE WITNESS: I actually can't read from this

13   distance.

14   THE COURT: We'll get there.

15   MS. COHEN: Yeah. Yeah.

16   Obviously, this witness can disagree. I am just --

17   am using it so that everyone's on the same page as to what the

18   score means. It might be helpful to the Court to say, oh, the

19   five means this or the five means that.

20   For that purpose, as a demonstrative, we would offer

21   this as Government Exhibit 98, subject to connection.

22   THE COURT: All right. With the caveat that it's

23   subject to connection, 98 is received in evidence --

24   (Government's Exhibit 98 was received in evidence.)

25   MS. COHEN: Okay.

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James – Cross/Cohen

1   THE COURT: -- as demonstrative exhibit.

2   And you don't have a tripod, do you?

3   MS. COHEN: I know. I could put it up on the chair,

4   and I have copies for everyone, as well.

5   THE COURT: Okay. All right. That's fine. Make it

6   easier, too. Okay. That would make it easier. We'll see if

7   we can get a tripod.

8   MS. COHEN: Okay. And in again is just so we're all

9   on the same page, there we go. Okay. Let me just --

10   THE COURT: Move on.

11   MS. COHEN: Sorry, Your Honor. Just trying to find

12 what I was talking about. (Peruses documents.)

13   Sorry, Your Honor. I misplaced our marked copies of

14 Government Exhibit 98, but as soon as we find them, we'll hand

15 them up, but I'll continue.

16   THE COURT: We have the chart.

17   MS. COHEN: Yeah, we have the chart.

18   THE COURT: Let's keep moving.

19   MS. COHEN: They're here somewhere.

20   THE COURT: Okay.

21 BY MS. COHEN:

22 Q   Now, going back to similarities, similarities is, as you

23 said, before is a -- tests the abstract reasoning, right?

24 A   That's correct.

25 Q   And that is really what you say is the essence of

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Official Court Reporter

James – Cross/Cohen

1   intelligence, correct?

2   A   I wouldn't say the essence of intelligence, but it's one

3   of the aspects that we consider when we think about definition

4   of intelligence. There are other aspects: Thinking quickly,

5   learning from experience, planning, et cetera.

6   Q   Right. And those all fall under -- I guess I was using

7   the words "essence of intelligence" because that that's what

8   you used in the Davis case.

9   So Mr. Wilson, in the -- got an 11, a seven, a four,

10 a seven, a nine, a seven and a six.

11   Now, the four is the lowest score. That's obviously

12 Dr. Nagler's score. That's borderline, right? The rest of

13 them -- we'll even throw out the 11, because that's very high

14 and we'll get to Dr. Abramson, but the rest of the consistent

15 scores are between seven, nine and six, right?

16 A   Yes.

17 Q   And those would be in the low average is a six, right?

18 Which is an IQ of about 80, right?

19 A   I don't really think that you can -- these aren't

20 equivalent. You can't make a scaled score equivalent to an IQ

21 score.

22 Q   Okay.

23 A   You don't used a scaled score in order to determine an

24 IQ, not in and of itself. So you can't look at a scaled score

25 and say, well, that's a four. That's an IQ of 70.

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James - Cross/Cohen

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1   Q    Well, it's not an equivalent but --

2   A    I mean, we're talking about percentiles.

3   Q    70 to 75 is its borderline, right, to give it some

4   context, an 80 or 85 would be a low average score in terms of

5   IQ, correct?

6   A    That's correct.

7   Q    So a six, seven -- a nine goes all the way up to average,

8   right?

9   A    Yes.

10  Q    So this is not an area where consistently, Mr. Wilson

11  tested in the mild intellectual disability range, correct?

12  A    I think there is variability in the score, and I think

13  the characterization of testing using a scaled score to say

14  someone tested in the mild intellectual disability range

15  doesn't make sense to me, since you don't use scaled scores to

16  do that.

17  Q    Each of these psychologists, when they give their report,

18  they use the subtest scores and when they talk about each

19  subtest, they say, well, that was in the low average, average

20  borderline range, correct?

21  A    They do, yes.

22  Q    And when you were testifying in the Davis case, in fact,

23  you looked at these subtests to determine what was the range

24  that this person was in, correct?

25  A    Right, that's correct.
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James – Cross/Cohen

1   Q   And by the way, I mean, you are obviously are much

2   more -- you're a psychologist. To you, you look at a scaled

3   score and it means something automatically to you, correct?

4   A   That's right.

5   Q   And this is, for someone, like me a lay person, I

6   obviously need to put this in some sort of context.

7   A   That's correct. And I think just my clarification is

8   that it's crude. It's a crude context in the sense that it's

9   not very precise.

10   Q   Okay. But without regard to the regard to the specific

11   number, we can also look at consistency between these

12   subtests, correct?

13   A   Right.

14   Q   Obviously, the subtests are important, because as you

15   testified in Davis, certain subtests tap into that abstract

16   reasoning, correct?

17   A   That's correct.

18   Q   Okay. And this is one of them, correct?

19   A   That's correct.

20   Q   And by the way, abstract reasoning, that part of your

21   intellect isn't something that can really improve, correct?

22   A   I would say that's correct.

23   Q   Okay. I mean, that's something innate, right?

24   A   I think there's -- I think there's probably a component

25   which is nurtured by our environment --

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James - Cross/Cohen

1   Q   Correct. Right.

2   A   -- in terms have your ability to see connections and see

3   patterns.

4   Q   Uh-hum (affirmative response).

5   A   And is also fostered by education.

6   Q   All right. Definitely. But there are certain -- I mean,

7   the ability to think abstractly in general isn't really going

8   to change throughout your life, right?

9   A   No.

10 Q   And in fact, in a very basic way, your IQ score doesn't,

11 I mean, your IQ, your true estimate of your IQ, your G, it

12 shouldn't really change?

13 A   The true score.

14 Q   The true score. Right. And in fact, but academics can

15 help to bring out that true score, right?

16 A   I'm not sure what context --

17 Q   In other words.

18 A   -- that would be.

19 Q   -- the things that you talked about, learning in your

20 environment and school, if you don't -- remember when we gave

21 the example of the person in the cave?

22 A   Yes.

23 Q   Right? That test, when they came out of the cave

24 wouldn't really be a true estimate of their intelligence,

25 correct? I mean, in some sense?

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James – Cross/Cohen

1   A   In some sense.

2   Q   Right. Because there are certain things that they never

3   would have been exposed to?

4   A   That's correct.

5   Q   So after academics, you would get a better estimate of

6   their true intelligence, right?

7   A   Yes.

8   Q   But there are certain things -- and we will get to

9   them -- certain of the subtests which might be consistent when

10 they came out of the cave and in the end, you see less of a

11 discrepancy, correct?

12 A   That's correct.

13 Q   Okay. So that's similarities.

14   Now, you also mentioned that I think it was the

15 block design -- let me just double check. I think it was

16 matrix reasoning, as we read in the Davis case, was one of the

17 other tests that tap into abstract reasoning, correct?

18 A   That's correct.

19 Q   And in matrix reasoning, that test wasn't given in the

20 earlier versions of the Wechsler test, correct?

21 A   That's correct.

22 Q   All right. So it started in, I think that was the WAIS-3

23 started doing matrix reasoning, right?

24 A   That's correct.

25 Q   And Mr. Wilson's matrix reasoning, he got four, nine,

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James - Cross/Cohen

1   seven and ten?

2   A   That's correct.

3   Q   And again, I know to you, you know what that means, but

4   just, I mean, that is basically, a nine and an eight would be

5   equivalent to about an average score, correct?

6   A   Yes.

7   Q   And a seven would be a --

8   A   Low average range.

9   Q   Right. A seven would be low average, right?

10   A   That's correct.

11   Q   So that's something Mr. Wilson -- with respect to mild --

12   whether it -- he's clearly away from the mild intellectual

13   disability with respect to that subtest, correct?

14   A   Again, you can't use a subtest to make a diagnosis.

15   Q   Okay. But in the Davis case, it was that very reason.

16   It was reason that Mr. Davis didn't have -- he had low

17   abstract thinking subtests scores. Do you recall that?

18   A   I recall that.

19   Q   And that was something that you felt was important in

20   that case in distinguishing why it was that Mr. Davis did not

21   have a learning disability, that he had mild mental

22   retardation, correct?

23   A   That's correct. It was important information to

24   consider, along with other information, but a subtest itself

25   does not make a diagnosis.

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James – Cross/Cohen

1   Q   Okay. And it's important in this case to consider, among

2   other information, correct?

3   A   Among other information.

4   Q   Correct. Okay. Now, another test that taps into

5   reasoning would be block design, right?

6   A   Block design taps into a number of different areas.

7   Q   Okay.

8   A   It looks at visual, reasoning and processing, also looks

9   as spacial visualization.

10   Q   And it taps into, I mean, it's a little bit more basic,

11   but you have to use your problem solving, correct?

12   A   That's correct.

13   Q   Okay. And put these blocks together, right?

14   A   That's correct.

15   Q   So that obviously is not something that academics would

16   impact heavily, correct?

17   A   That's correct.

18   Q   Okay. And Mr. Wilson's block design, he started out his

19   first score was an eight. Again, we don't have a score for

20   Aranoff. She said average, low average. He got an eight

21   again with Drezner, a nine with Nagler, a nine with Gilio, a

22   nine with Dr. Pop, a ten with Dr. Drob, and an eight with

23   Dr. Denny.

24   So we can say that that subtest, he hasn't had a

25   problem with that subtest, right? I mean, those scores across

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James - Cross/Cohen

1   the border are in the average range, right?

2   A   That's correct.

3   Q   Okay. Now, the other test the test of digit span, that

4   was one in which Mr. Davis actually scored well at. Do you

5   recall that?

6   A   That's correct.

7   Q   Okay. And that you described as a measure of -- we

8   already talked about this -- more of a measure of concrete

9   thinking, correct?

10   A   I believe I said it was a measure of auditory attention.

11   Q   Okay. Auditory attention?

12   A   And working memory.

13   Q   Okay. So and we read your testimony from the Davis case.

14   I think in that case -- yes. Auditory attention, and it was

15   the phone book example you gave, correct?

16   A   Right. So digit span is a measure of auditory attention.

17   Q   Right. And that was significant that Mr. Davis scored

18   well on that as compared to the other tests we just reviewed,

19   correct?

20   A   That's correct.

21   Q   Now, in this case, Mr. Wilson, he didn't so well on the

22   digit span, correct? I mean he's got -- five was his first

23   score. That's around a borderline. He had a low average.

24   Again, we don't have the scores, so we have to rely on a

25   description, so it's hard. Dr. Nagler, seven; Pop, six; Drob

James – Cross/Cohen

1   is six; and Dr. Denney, an eight.

2   So, I mean, basically he's in this borderline low

3   average range?

4   A   That's correct, on a measure of auditory attention and

5   short term memory, working memory.

6   Q   And you would agree that those problems are also present

7   with individuals with ADHD, right?

8   A   Yes.

9   Q   And also present with individuals with a learning

10 disability, correct?

11 A   That's correct.

12 Q   Now, another area where Mr. Wilson scored poorly is

13 vocabulary, correct?

14 A   Correct.

15 Q   And his vocabulary started out a six, was a seven, a

16 four, a two. It went down with Gilio to a two. A four, a

17 three and a seven.

18 A   That's right.

19 Q   Now, again, vocabulary is somewhat affected by your

20 reading, correct?

21 A   That's correct.

22 Q   And by your schooling, what you're learning in school?

23 A   That's correct.

24 Q   And so, you would agree if a person gets schooling or

25 improves their reading, you would see a little bit of an

James – Cross/Cohen

1   increase in that score, correct?

2   A   That's correct. But vocabulary is also a test that has a

3   high G loading, as well. So it is associated with general

4   mental ability.

5   Q   Okay. But somebody with who can't read is obviously

6   going to do poorly on the vocabulary section, correct?

7   A   No, that's not necessarily correct. In fact, I've

8   evaluated individuals who cannot read, but have excellent

9   language based processing, and excellent vocabulary skills.

10 Q   Okay. But clearly, vocabulary, if you had a learning

11 disability, it would be affected, right?

12 A   No, not necessarily.

13 Q   Okay. Well, according to Dr. Kaufman, we already talk

14 about that there are several -- several verbal subtests that

15 tap information taken directly from school learned knowledge.

16   So while it's not entirely school learned, there is

17 some component of it that is school learned, correct?

18 A   Yes. There's some component of vocabulary that is school

19 learned and there are individual who have learning

20 disabilities, who have excellent vocabulary scores, but cannot

21 read.

22 Q   But one way you would be able to determine if the

23 vocabulary score was another problem, like a learning

24 disability or something like that, if that person got specific

25 help in that area, you might see an increase there, correct?

James - Cross/Cohen

1 A   Depending on the problem. I mean, if it was a larger

2 language based problem or a problem with broader concepts,

3 because vocabulary also includes some words as you get further

4 in vocabulary they are less concrete and more abstract. So an

5 improvement in vocabulary, you would have to take a look at

6 the specific circumstances to understand why that was

7 happening.

8 Q   Okay.

9 A   In someone with -- for example, I've seen people with

10 reading disabilities who have good vocabulary, reading

11 disabilities who don't. Vocabulary is often depressed in

12 individuals with intellectual disability, for the reason I

13 just mentioned. There that are aspects of vocabulary that

14 include more abstract concepts.

15 Q   Okay. But again, when we're talking about mental

16 retardation, we're talking about something that's pervasive,

17 correct?

18 A   That's correct.

19 Q   And with some something that's pervasive, you're going to

20 see very low scores across the board, right?

21 A   Yes. And that's true for his vocabulary.

22 Q   Now, you also said that there are things you would have

23 to really look at the person to see, okay, have there been

24 improvements, what's that person doing, right?

25 A   Right.

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James – Cross/Cohen

1   Q   And in this case, we actually have the benefit of that,

2   right, because we have Mr. Wilson's records --

3   A   That's right.

4   Q   -- from very young, right?

5   Now, taking -- focusing for a moment on Giglio's

6   score of a two --

7   A   That is correct.

8   Q   -- now a two is a very bad score for vocabulary?

9   A   That's correct.

10   Q   And while someone with mild mental retardation, as we

11   talked about many aspects in the case, can improve certain

12   things in a life, right? They can learn at certain jobs, they

13   can improve their home living. Just because somebody does

14   something better now doesn't mean that they don't have mild

15   intellectual disability, right?

16   A   That's right.

17   Q   It's more difficult -- when you're talking about academic

18   learning, it's more difficult for someone with mild

19   intellectual disability to really learn, right?

20   A   It's more difficult for them to learn.

21   Q   And in fact, if we look at a person's history and that

22   person, you know, let's say they had parents that were -- I

23   mean, they were really getting them tutoring, and they never

24   let them miss school and they read to them every night, if you

25   took somebody like that who never improved on their

James - Cross/Cohen

1   vocabulary, that would be a very good sign of mild mental

2   retardation, correct?

3   A   Or a significant language disorder.

4   Q   Or a significant language disorder.

5   However, it's easier, right, if you have let's say

6   dyslexia, right?

7   A   That's right.

8   Q   It's easier for somebody to learn how to deal with that

9   disability than it is for someone with mild mental retardation

10   to really improve upon their academics?

11   A   When you say "deal with that disability"?

12   Q   I'm sorry. Let me rephrase.

13   To overcome that disability? I mean, there is a way

14   to overcome a lot of learning disabilities, correct?

15   A   I wasn't aware of that.

16   Q   Well, there's a way to improve your learning, right?

17   A   I mean, individuals with learning disabilities can

18   continue to have learning disabilities their whole life.

19   Q   Right. But they can get also get a lot of help that

20   helps them to be able to read better, right?

21   A   They often get help that -- actually, the research shows

22   that someone with a reading disability, the true reading

23   disability, when they have intervention --

24   Q   Uh-hum (affirmative response).

25   A   -- to help them read --

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James – Cross/Cohen

1   Q   Right.

2   A   -- it's about helping them to decode. They become better

3   decoders.

4   Q   Right.

5   A   Bet they remain very, very slow readers.

6   Q   Right. Right. It's helping them to almost read

7   differently. Is that a good way to put it?

8   A   I wouldn't say read differently. It's teaching them the

9   decoding skills they don't have.

10   Q   Okay.

11   A   And yet they continue to have the learning disability

12   because they're reading so slowly.

13   Q   Right. I mean, people without that decoding problem,

14   that's something that comes automatic. They to have learn how

15   to decode separately, right?

16   A   Some do. I've seen kids who are hyperlexic and who read

17   without any instruction, too.

18   Q   Okay. But my point is someone with a mild mental

19   retardation, it's harder for them to learn things, right?

20   A   In general, yes.

21   Q   And in fact, in the Davis case, Mr. Davis had a very

22   involved mother, right, in his life?

23   A   I honestly don't remember.

24   Q   Okay.

25   A   It's been four years.

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James – Cross/Cohen

1   Q   I can refresh your recollection. But he had a mother who

2   was really taking him to school, and he himself showed a lot

3   of motivation growing up. Do you recall that?

4   A   Yes, I recall that.

5   Q   It was that fact that showed that this is not somebody

6   who just had a learning disability, because there wasn't

7   anything they could do, no matter how hard they tried, he

8   couldn't get his intellectual ability over that 70 mark or

9   within the band and the Flynn and all that, he couldn't

10   improve, right?

11   A   I'm sorry. Could you rephrase that?

12   Q   He could not improve. That was one of the things that

13   you focused on?

14   A   Yes.

15   Q   Despite that trying, he couldn't improve.

16   Okay. Now going back to the vocabulary. The Giglio

17   score, that was I believe in the year 2000. It was in April

18   of 2000, when Mr. Wilson -- shortly after he arrived at

19   Brookwood. Do you recall that?

20   A   Yes. That's correct.

21   Q   And you would agree that up until the time of Brookwood,

22   Mr. Wilson's attendance and his -- he had a lot of problems in

23   school. I'm sorry, not 2000. It was '98. 2000, he got out

24   of Brookwood. Excuse me. It was in April of 1998. But the

25   point being that was when he first got in Brookwood?

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James – Cross/Cohen

1   A   In April of '98. Yes, because he left November of '99.

2   Q   Yes. And he arrived in January of 1998?

3   MR. BURT: Judge, I understand a little bit of focus

4   on the other case, but it seems like we're getting into an

5   awful lot of detail about the Davis case. We've already won

6   that case. I'm not sure why we're going back into it in such

7   detail. I would raise a 403 objection to this line, unless

8   there's some reason that escapes me.

9   MS. COHEN: We're talking about Brookwood and this

10   case right now. The only reason we're talking about Davis is

11   to show potential discrepancies, obviously. But right now,

12   I'm asking questions on Mr. Wilson's attendance at school and

13   list vocabulary score.

14   THE COURT: Oh, all right. I see no reason why,

15   since this witness testified in Davis, the question of

16   comparisons can be raised, but I admonish everyone that we are

17   focused on this case and not on Davis. So with that in mind,

18   the objection is overruled.

19   BY MS. COHEN:

20   Q   Okay. So Mr. Wilson, Gilio, that was the beginning of

21   his stay at Brookwood, right?

22   A   That's correct.

23   Q   And that's his lower score of two, right?

24   A   Yes.

25   Q   And in 2000, when he was tested by Pop, that was when he

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James – Cross/Cohen

1   just got out of Brookwood, right?

2   A   Yes. That's correct.

3   Q   And while Mr. Wilson was at Brookwood, you reviewed those

4   records, correct?

5   A   Yes.

6   Q   And you would you agree -- and there's a been lot of

7   testimony on this -- that Mr. Wilson, he improved. He was in

8   a good, for him, as compared to the past, he improved a lot at

9   Brookwood, right?

10 A   When you say a lot --

11 Q   Oh, right. I mean, he didn't come out of there with a

12 high achievement or anything. Still, but in comparison to his

13 prior academics, he was reading lowly, still had all of the

14 problems, obviously, but he was in a better -- he was

15 attending -- let me step back.

16   He attended classes at Brookwood, right?

17 A   That's correct.

18 Q   He had to attend classes at Brookwood, right?

19 A   That's right.

20 Q   There's been testimony that it was a therapeutic

21 environment at Brookwood?

22 A   Yes.

23 Q   There's been testimony, in fact, just yesterday Mr. Gilio

24 who gave him the test testified that he improved, that he did

25 well at Brookwood. Do you recall that?

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James – Cross/Cohen

1   A   Are you saying well socially, behaviorally, academically?

2   Q   Well, let me look back at and you will know exactly.

3   Forget Gilio for a moment. You would agree that the records

4   show that in comparison the past, he was in a better place

5   when he came out of Brookwood?

6   A   You were asking better place. I wasn't sure what better

7   place meant.

8   Q   He was doing better, right?

9   A   I'm not sure in what way he was doing better.

10   Q   Well, his -- did you read the --

11   A   He showed some improvement in his reading --

12   Q   Okay.

13   A   From age 15-11 to 16-11, but his reading -- actually, if

14   you don't mind, I would like to refer that to.

15   Q   Sure. I think we can all agree Mr. Wilson did not read

16   very well, no matter what time we're looking at, right?

17   A   Yes. That is correct.

18   Q   Right. While you're looking at that, can I ask you a

19   question while you're looking at it?

20   A   Yes. Certainly.

21   Q   Just to make this easier, I mean, prior to that,

22   Mr. Wilson had a lot -- he wasn't regularly attending classes,

23   right? There was some evidence of that in the record, right?

24   A   I do remember, yes.

25   Q   And he had hospitalizations, right?

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James - Cross/Cohen

1   A   Yes. That's correct.

2   Q   So there were -- he also talked about I think in a

3   variety of interviews in this case and through the records

4   that he didn't really want to be there, right? He didn't want

5   to be in the school?

6   A   That's correct.

7   Q   And he wasn't focused on that, right?

8   A   I read a lot of records, so you would have to point me to

9   where that says that.

10 Q   Okay. That he, I mean, he was not -- you wouldn't

11 classify him as a good student before he got to Brookwood,

12 right?

13 A   That's correct.

14 Q   Right. And when he got to Brookwood, there was no choice

15 about attending class, right?

16 A   That's correct. (Peruses document.)

17   Okay. I just found the place --

18 Q   Okay.

19 A   -- in the record here. It looks like at 15-10, his

20 reading was at the second grade level.

21 Q   Uh-hum (affirmative response).

22 A   And he improved to the late third to early fourth grade

23 level at 16-10. His math, however, did not improve in the

24 year's time. So in 12 months time, he improved about four

25 months in math.

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James – Cross/Cohen

1   Q   So he showed some improvement is the point, right?

2   A   At a quite a bit of a slower rate in comparison to peers.

3   Q   Oh, right. Absolutely. But he certainly improved two

4   grades up in a year's time, which makes him maybe slow as

5   compared to others, but it's definitely an improvement, right?

6   A   And he's almost 17 at this point, and reading at an early

7   fourth grade level.

8   Q   No one is saying he's a great reader. That's not my

9   question. My question is, he improved some, correct?

10   A   Correct.

11   Q   And you look at the score of two in the vocabulary, as

12   compared to when he went out of Brookwood, there is some

13   improvement in that that score, correct? I mean, he got a two

14   with Gilio and a four with Pop, right? And feel free to look

15   at the actual -- you can look at my chart or the actual

16   tests, whichever you're more comfortable with.

17   A   (Peruses document.) So, yes. That's not a significant

18   difference, the two to the four. I mean, we're talking about

19   scale score.

20   Q   Okay.

21   A   So. We're talking about the .4 percentile and the second

22   percentile.

23   Q   Right, but I mean, again --

24   A   I wouldn't be able to call that a significant improvement

25   in analyzing scaled scores.

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James – Cross/Cohen

1   Q   Okay. And I didn't call it a significant improvement.

My point is, it was an improvement, correct?

3   A   I don't know that it's a meaningful improvement. That's

4   what I'm saying, because we're looking at the level of scaled

5   scores. Going from the two to a three, it's an increase in

6   number --

7   Q   Uh-hum (affirmative response).

8   A   -- but it doesn't necessarily mean at that level that

9   that's actually meaningful.

10   Q   Okay.

11   A   Meaningful in real life.

12   Q   And I wasn't asking you if it was meaningful. I'm simply

13   saying, there is some improvement, correct?

14   A   Yes. One scaled scored point or two scaled score points.

15   Q   Two. And with Dr. Drob, he went down actually, back to a

16   three, right?

17   A   That's right.

18   Q   Okay. And with Dr. Denny, he scored a seven, right?

19   A   That's correct.

20   Q   You would agree, that's a significant increase.

21   A   I would say that that would be a meaningful improvement,

22   yes.

23   Q   And you are aware that Mr. Wilson has been reading since

24   he's been in prison, correct?

25   A   Yes, he told me he has been reading.

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James – Cross/Cohen

1 Q   And he's a prolific emailer, correct?

2 A   Yes.

3 Q   And he's really trying to learn, right?

4 A   That's correct.

5 Q   Okay. Now, all right, let's move on. Obviously, there

6 are other scores here, but let's move onto -- oh, actually one

7 other subtest before we move on.

8   Along the same lines, we talked about earlier that

9 the information subtest is a test that scores things like

10 continents and who is Cleopatra, I gave examples of?

11 A   It's general factual knowledge.

12 Q   Thank you. General factual knowledge, that you learned

13 either from school, right?

14 A   Yes.

15 Q   Or you said, maybe in your environment, from home?

16 A   From home, from just being alive and wandering around the

17 streets and -- yes.

18 Q   Right. Okay. Now again, we take a look at Gilio's score

19 when Mr. Wilson arrived at Brookwood or shortly after he

20 arrived, we see a score of three?

21 A   Yes.

22 Q   Again, that is very low?

23 A   That's correct.

24 Q   And again, just put this -- I know it's hard to quantify

25 it, in the one percentile, right?

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James – Cross/Cohen

1   A   That's correct.

2   Q   That's right? And I mean, that's in the mild -- just

3   again, to put into context, the mild intellectually disabled

4   area, right?

5   A   Again, I just don't -- we don't classify scaled scores

6   that way. We don't have scaled scores that way.

7   Q   It's low?

8   A   It's low.

9   Q   And then we when you see when he got out of Brookwood

10 with Pop, that goes up to a six, right?

11 A   That's correct.

12 Q   And that score, that improvement, could be obviously

13 attributed to the things that he was learning at Brookwood,

14 right?

15 A   It could be, although there's quite a bit variability in

16 the scores across the board. I mean, he has a five at one

17 point and a one at one point, a three, a six and there is a

18 quite a bit of variability in the scaled scores.

19 Q   Right. But we've already talked about the fact that

20 prior to Brookwood, Mr. Wilson was not doing well in school,

21 right?

22 A   And he continued to not do well in school after

23 Brookwood.

24 Q   Right.

25 A   Given that he had very, very low academic achievement

James – Cross/Cohen

1   scores across the board.

2   Q   Of course after Brookwood, we only have -- and this is

3   already in evidence, just to give you some context, Government

4   Exhibit 51 -- after he's out of Brookwood, he's only got about

5   six months until he goes back into the Rikers, gets out in

6   March of 2001. He's out for about -- a little over a year, a

7   year, little over. He goes back in for a short time and then

8   of course, in 2003, he has been in.

9   My point being, there wasn't much more education he

10   could have availed himself of after Brookwood, right?

11   A   That's correct.

12   Q   Okay. So the scores up until Brookwood, again, his

13   information is going to be low, because he's not attending

14   school, and he's not being read to at home and he's not

15   hanging out with a lot of people that know about the world and

16   history and those types of things, correct?

17   A   That's correct.

18   Q   Okay. So after he gets out of Brookwood, he gets a score

19   of six, and the significance of that six is that he gets a six

20   with Dr. Drob, and he gets a six with Dr. Denney, right?

21   A   That's correct.

22   Q   So that that learning that he got at Brookwood, was

23   obviously reflected and maintained in that score, correct?

24   A   I don't think that I can make that assumption.

25   Q   Yeah. Let me rephrase. It was bad question, because

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James – Cross/Cohen

1   obviously, we don't know what he got from there.

2   But you would agree that he showed improvement in

3   that score after Brookwood, correct?

4   A   That's correct, but prior to that time, he also had -- he

5   had a five, which is one point lower than a six.

6   Q   Right.

7   A   Then his scores dropped. I mean, there's a lot of

8   variability here. I'm not sure that I can attribute

9   improvement in information to being at Brookwood.

10   Q   Okay. We're not trying to specifically improve it -- tie

11   to it Brookwood, but I'm just stating the facts.

12   Before Brookwood, he wasn't getting consistent

13   education. His head wasn't in it, and he wasn't getting

14   instructions at home, correct?

15   MR. BURT: I'm going to object to that question.

16   THE COURT: Sustained.

17   A   Information --

18   THE COURT: No, no. This is sustained.

19   MS. COHEN: You don't answer.

20   BY MS. COHEN:

21   Q   Prior to Brookwood, Mr. Wilson was not school. He had a

22   lot of problems in school, right?

23   A   That's correct.

24   Q   And at Brookwood, we've already talked about, he did show

25   so improvement in school, correct?

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Official Court Reporter

James – Cross/Cohen

1   A   That's correct.

2   Q   So after Brookwood, his score was a six consistently,

3   correct.

4   A   That's correct.

5   Q   Okay. All right. Now, let's move on.

6   By the way -- or withdrawn.

7   Dr. James, in your report, one other thing you talk

8   about with people with mental retardation is that they have a

9   slower rate of growth, right? I mean, as compared to other

10 children.

11 A   (Peruses document.)

12 Q   On page five of your report?

13 A   (Peruses document.)

14 Q   I'll just read from your report. I believe it's page

15 five. You had page numbers, right?

16 A   No. I don't. I have --

17 Q   I put my own on them.

18   Under review of previous assessments of academic and

19 intellectual functioning. I mean, you --

20 A   That's correct.

21 Q   -- you talked about the fact that people with mild mental

22 retardation, you might not see it when they're very young,

23 right?

24 A   That's correct.

25 Q   That's because as their peers are advancing, the spread

James – Cross/Cohen

1   between them and their peers gets wider?

2   A   That's correct.

3   Q   You would agree, Dr. James, that people with other --

4   variety of other developmental disabilities, you might also

5   see that same spread between those individuals and their

6   peers, correct.

7   A   That's correct.

8   Q   All right. Now, let's talk about -- get to your chart,

9   the IQ scores.

10   Now, talk about Flynn for a moment. Okay. You

11   testified -- you talked about the norming dates, right? You

12   were asked about the norming dates?

13   A   That's correct.

14   Q   And and you pointed out that in the Davis case, you got

15   the norming date wrong, right?

16   A   In the Davis case, the correction was made using the data

17   publication and not the year the test was normed.

18   Q   Right. In the year that the test was normed is when all

19   the norming information is gathered, right?

20   A   That's correct.

21   Q   So it's not when the norming starts. It's when it

22   finishes, right?

23   A   It's the year that it's normed.

24   Q   Right. But I mean, you don't norm overnight, right?

25   A   No, you don't norm overnight.

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James – Cross/Cohen

1   Q   Right.

2   A   The reference that I'm using for that is Flynn's papers,

3   which has the years of norming.

4   Q   Right. "Tethering the Elephant"?

5   A   That's correct. And these are all the norming dates,

6   based on that paper.

7   Q   Okay. Now, the norming date, as you said, is different

8   from the copyright date, right?

9   A   I'm not sure what you mean by the copyright date, but

10 there is a date of publication for the test, and that is a

11 different date, yes.

12 Q   Okay. And these books, I mean, I've got them here, the

13 WAIS-3, right?

14 A   That's right.

15 Q   The WISC-3, right?

16 A   That's right.

17 Q   And THE WAIS-4, right?

18 A   Right.

19 Q   You would agree, those are the manuals for the tests,

20 right?

21 A   That's correct.

22 Q   Okay. And despite what Flynn has in his article

23 "Tethering the Elephant," the best place for the norming date

24 is actually the tests themselves, correct?

25 A   I don't know that the date of norming is actually in the

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James – Cross/Cohen

1   test themselves. You would have to show me where that is.

2   Q   Okay. Well, let's start with the WISC-3. Well, yeah,

3   the WISC-3. Take a look at --

4   MS. COHEN: May I approach, Your Honor?

5   THE COURT: Yes, you may.

6   BY MS. COHEN:

7   Q   (Approaching) I'm showing you the WISC-3. They have a

8   copyright date of 1991, which is what -- see there on the top?

9   A   That's correct.

10 Q   But the WISC-3 has a separate line that tells you when

11 the normative copyright date is, right?

12 A   That's correct.

13 Q   And that normative copyright date is also 1991?

14 A   That's correct.

15 Q   So in fact, the normative date, according to the WISC-3

16 manual is 1991, right?

17 A   Well, there must be a distinction between -- the norming

18 date is not the same as the normative data copyright.

19 Q   Okay. How are they different?

20 A   Well, because the norming date is the year of norming and

21 that can't be the same date that the copyright of the actual

22 book is, because or the test because that is -- it's the same

23 date. It's 1991.

24   So the norming process occurs before. So because

25 the norming process occurs before the actual date of

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1   publication of the test, it's -- the norming date can't be the

2   same date as the normative date of copyright. Otherwise, they

3   would be norming the test at the same moment it was published,

4   and that's not possible.

5   Q   Okay. But you would agree that they get the norming

6   information, takes a considerable time to gather, right?

7   A   Yes.

8   Q   Okay. So by the time the norming is gathered, is all

9   gathered and presented, in fact, it could be the same year

10   that the manual was published, right?

11   A   I actually don't know that that's the case.

12   Q   We don't know. But the point is, is that the WAIS-3, the

13   WISC-3, the WAIS-3 -- we can check them all -- and the WAIS-4

14   they all indicate a separate line for copyright and normative,

15   right?

16   A   Right. Again, the year that the test was normed or the

17   time period in which the test was normed and the year that's

18   given for norming is not necessarily the same thing as the

19   normative copyright date.

20   Q   Okay. But Dr. James --

21   A   And Dr. Flynn, who is the authority in this particular

22   area, gives the year of norming as with the one to be used.

23   Q   Well, two things. Dr. Flynn is the authority on the

24   Flynn effect, correct?

25   A   He is the authority in this effect, yes.

James – Cross/Cohen

1   Q   The Flynn Effect. But the people that write the tests

2   are the authority on the norming date, correct?

3   A   They are the authority on the norming date, yes.

4   Q   They're the ones that know when the norming date is

5   completed, correct?

6   A   That is correct.

7   Q   Okay. And the -- all three of these test manuals, they

8   all have a separate copyright dates and separate normative

9   copyright dates, correct?

10 A   That is correct.

11 Q   So it's your testimony that they can't be the same,

12 right?

13 A   Well, it's my testimony that there has to be a different

14 between the year normed --

15 Q   Right.

16 A   -- and the normative copyright date.

17 Q   Absolutely. And that, right, is the very reason why they

18 delineate the difference between the copyright date and the

19 normative copyright date, right?

20 A   Well, the copyright date is the year that the test was

21 published, so that doesn't have anything to do with the

22 norming. What I'm talking about is a distinction between the

23 years normed and the normative copyright date.

24 Q   Right. And the normative copyright date could be the

25 date in which the norms were completed, correct?

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Official Court Reporter

James – Cross/Cohen

1   A   I don't know.

2   Q   Okay. You don't know? In the Davis case, you thought it

3   was, obviously correct?

4   A   No. In the Davis case, I used the publishing date, not

5   the normative copyright date.

6   Q   But in fact, your publishing date in the Davis case

7   matches up with the normative date in the manuals?

8   A   And I don't know if it matches up with all of the

9   manuals. I didn't look at the normative copyright date. I

10   looked at the publication date.

11   Q   Okay. I guess you got lucky in that case. Okay. Moving

12   on.

13   So obviously, you don't know exactly what Dr. Flynn,

14   where he gets his normative date, right?

15   A   You.

16   Q   You just know he said it in "Tethering the Elephant"?

17   A   I know that he's referring to the year in which the test

18   was normed.

19   Q   Okay. All right. Now, you talked on direct

20   examination -- I think we should -- let's put this -- your

21   chart up, just so that we're all on the same page again.

22   You talked in direct examination about this first

23   score of Dr. Abramson and you compared that to Doctor -- well,

24   I guess psychologist Drezner, who -- the full scale for

25   Drezner is -- oh, wait. By the way, sorry. Can I go back for

James – Cross/Cohen

1   one minute?

2   If in fact the normative days were off, it would

3   just change these just about a point each time, right?

4   A   It would change, depending on the norming date.

5   Q   Yes.

6   A   I would have to recalculate it.

7   Q   And would it change it slightly?

8   A   I imagine it would change it slightly.

9   Q   So if the norming date was 1991, as I just showed you in

10   the WISC-3, there would be no adjustment for Flynn, right?

11   A   That's correct.

12   Q   Okay. And if it was 1997, which according to the WAIS-3

13   manual is the normative copyright. Again, I know you

14   disagree. But hypothetically, in 1997, it would raise, again,

15   the full scale IQ, the Flynn adjusted full scale IQ a little

16   bit?

17   A   That's correct. Although that's again, not the

18   adjustment based on the date that Flynn gives.

19   Q   On your interpretation on Flynn?

20   A   No.

21   Q   On Flynn's "Tethering the Elephant," it doesn't match up

22   on --

23   A   On the chart that he gives for all the years of norming.

24   Q   Okay. Now, he doesn't, by the way, in this article give

25   the norming date for the WAIS-4, right?

James - Cross/Cohen

1   A   No, he does not.

2   Q   And the WAIS-4, you know, I have got it here, has a

3   normative copyright of 2008, right? If that was the normative

4   date, it would go up a little more, as well, correct?

5   A   If that was correct.

6   Q   Okay. Now, going back to my point I was just asking

7   between you -- you were using Dr. Abrahmson's 78 full scale.

8   You compared it to the full scale IQ of Drezner without Flynn,

9   to show that, in fact, the Flynn effect is spot on. The Flynn

10   effect accurately shows the shows that IQ does increase with

11   the years, right.

12   A   That is correct.

13   Q   Because those scores match up?

14   A   That is correct.

15   Q   Now, you also said that there first score was real

16   invalid, right, I mean --

17   A   I'm sorry?

18   Q   Let me rephrase. You stated that first score, when you

19   were below the age -- when you're age six, you can't really

20   read too much into that, right?

21   A   I said that you would put less weight on it.

22   Q   Right. Okay. So in one sense, you're saying put less

23   weight on it. In the other sense you are using it to show,

24   hey, look. The Flynn effect is right on, right?

25   A   That is a statistical calculation. It's just a fact.

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Official Court Reporter

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James – Cross/Cohen

1 Q   Okay. But if in fact, the 1989 score has problems, then

2 that can't be used to prove that Flynn is accurate in the 1991

3 score, right? You can't have it both ways?

4 A   There are different issues. I mean, the problem with the

5 1989 score in terms of the -- I'm sorry, the problem with the

6 Drezner's 1991 score, in terms of the substitution, is a

7 different source of error than the Flynn effect.

8 Q   Okay.

9 A   They're different situations. So, yes, you can have the

10 operation of the Flynn effect, and you can also have an

11 examiner that departed from nonstandardized procedures. They

12 can both exist.

13 Q   Okay. But if you're saying we should disregard the

14 Drezner score because of errors and substitutions, then how is

15 it that we can took look to that score to show that the 1989

16 scores prove that the Flynn Effect works?

17 A   Well, I'm not asking for one to disregard any of these

18 scores.

19 Q   You're not asking --

20 A   I'm talking about -- no, I don't believe I said

21 disregard.

22 Q   Okay. But you're focusing on Nagler and Dr. Drob,

23 because you said the other tests have a variety of problems

24 such that you can't check them, right?

25 A   I said that we're considering all of the scores, but

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James – Cross/Cohen

1   putting more weight on the ones that we would be more

2   confident about for a variety of reason, including less errors

3   and less confident about the ones that include more sources of

4   potential error.

5   Q   So my point simply is on direct examination, you compared

6   Dr. Drezner's full scale IQ to Dr. Abrahmson's Flynn affected

7   full scale IQ to show that in fact age tests matter, right?

8   A   That is correct.

9   Q   Okay. But that's not really a fair comparison if you use

10 your same line of reasoning that there maybe problems with Dr.

11 Drezner's score, that's all I'm saying, right? If the 78

12 isn't a true score, then how do we know that that shows that

13 the Flynn effect really works?

14 A   Again, I don't think that they're related to each other.

15 I mean, they're two different sources of potential error and.

16 Both can exist.

17 Q   Yeah. I think we're talking about two things. My point

18 is simply you're using these two scores to show, look, Flynn,

19 Flynn is absolutely right. That the different between 1989

20 and 1991 proves it. I'm simply saying that you're also saying

21 at the same time there are problems with the 1989 score and

22 there are problems with the 1991score, correct?

23 A   I'm saying that when the 1989 score is uncorrected,

24 that's problematic. The 1989 score corrected is not

25 problematic for -- in terms of the Flynn effect when -- it's

James – Cross/Cohen

1   problematic for other reason, but not when it's correct for

2   the Flynn effect.

3   Q   Okay.

4   A   The 19991 score is problematic for other own reasons.

5   Q   My simple point is that if Flynn is correct, then Drezner

6   must be correct, because they match up, right?

7   A   I'm sorry. If Flynn is correct?

8   Q   If Flynn is correct that it should be 78 instead of an 84

9   with Abramson, you used that to match up with Drezner to show

10 that Drezner's score of 78 shows that it in fact when there is

11 a new test, you get the same score. Isn't that your point?

12 A   My point is that there were old norms that were used for

13 Abramson.

14 Q   Right.

15 A   When the norms were corrected, then it produces a full

16 scale IQ that's closer to Drezner's.

17 Q   Right.

18 A   But it doesn't mean that there still aren't problems with

19 Drezner's.

20 Q   Okay.

21 A   And problems with Drezner's can affect the scores in ways

22 that we don't know. Because it's error and error produces

23 variability. And how it produces variability, we don't know.

24 Q   Okay. And other words, if Drezner messed up the test,

25 right, and let's say instead of 78, it was 85 or instead of a

James – Cross/Cohen

1   78, it was a 70, either way, that won't show your point that

2   you made with respect to Flynn. That's all I'm saying you.

3   A   Yes, that's correct.

4   Q   Okay. Now, Flynn in this case is particularly -- the

5   Flynn effect is important, right?

6   A   I'm sorry?

7   Q   The Flynn effect is in important in the case, because

8   without the Flynn effect, you're only left with one score in a

9   70 or below range, correct?

10 A   Well, I believe the Flynn effect is important because

11 it's best practices to correct for aging and obsolete norms.

12 So it's applied not selectively. It is applied because it is

13 best practices to apply it.

14 Q   Okay. It's best practices in a forensic context,

15 correct?

16 A   Well, it's best practices to apply it's cording to AAIDD.

17 Q   Okay. I'm not talking about AAIDD. I'm talking about

18 you. In your clinical from practice, you don't apply Flynn,

19 correct?

20 A   I don't typically, but I am actually starting to consider

21 it, only because now we're dealing with WISC-4s that are about

22 12 years old.

23 Q   Okay. Well, according to your norming date, right, of

24 2006, correct?

25 A   Well, there are no WISC-4s in this.

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James – Cross/Cohen

1   Q   I'm sorry?

2   A   The data.

3   Q   The WAIS-4?

4   A   No, the WISC-4.

5   Q   Oh, oh. Okay. I misheard. I thought you said WAIS-4.

6   Got it.

7   But in fact, you testified in Davis that you didn't

8   use it in your clinical practice, right?

9   A   That's true three years ago.

10   Q   In fact, you had never applied the Flynn effect before

11   Davis, correct?

12   A   That's correct.

13   Q   Okay. And it's since Davis that you have been involved

14   in forensic work, correct?

15   A   That is correct.

16   Q   And it's since Davis that you started giving

17   presentations to the defense bar?

18   A   That's correct.

19   Q   And now you are an advocator of the Flynn effect,

20   correct?

21   A   I wouldn't call myself an advocate of the Flynn effect.

22   I'm an advocate of applying best practices and best practices

23   include applying the Flynn effect.

24   Q   But those best practices didn't come into play in your

25   practice until Davis, correct?

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Official Court Reporter

James – Cross/Cohen

1 A   That is true. And there are --

2 Q   I'm asking you yes or no.

3 A   That was correct.

4 Q   Okay. Now, without Flynn, we only have one score that's

5 in the mild intellectual disability range and that is the

6 Nagler score. There is without Flynn, right?

7 A   That is correct.

8 Q   Okay. Now, Nagler the reason you say that we should rely

9 upon Nagler is because she has raw data?

10 A   I'm sorry. The Drob score is also.

11 Q   Well, the Drob score, you have Flynn, right?

12 A   Yes. I'm looking at the wrong chart, wrong aspect of the

13 chart.

14 Q   Because we would be in the 76, okay.

15   Now, when we were talking also -- let me just make

16 this point, when we were talking about before, about the band

17 of confidence, you talked about the fact that when you get

18 to -- you had a 75, right?

19 A   That's correct.

20 Q   That that gets you at the confidence interval, you said

21 that that gets you into the mild intellectual disability

22 range, right or the mild mental retardation range?

23 A   I said that when you're looking at scores --

24 Q   Uh-hum (affirmative response).

25 A   And you're looking to where these scores fall, and then

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James – Cross/Cohen

1   what further steps to do diagnostically, that when you look at

2   the correct full scale IQ scores and you develop confidence

3   bands, interval bands around them, you see that these

4   confidence bands, confidence interval bands overlap. They

5   contain overlapping scores.

6   Q   Let me just make sure that I understand this. If we have

7   a score a 70, for example, right? Let's say a 70?

8   A   That's correct.

9   Q   And you apply a confidence band around that?

10 A   That's correct.

11 Q   Now I'm not doing any math adjusting for age. I'm just

12 talking general five point estimate that we give?

13 A   Right. And that is the average.

14 Q   Right. The average. So that would come down as low of

15 65, right?

16 A   Right.

17 Q   It could go as high as 75, right?

18 A   That's correct.

19 Q   Now, if you have a score of 80, that can go down to 75,

20 right?

21 A   That's correct.

22 Q   It could go as high as 85?

23 A   That's right.

24 Q   Just for a moment I just, so I think -- it's hard to

25 picture this. I'm looking at -- just looking at what -- I

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James - Cross/Cohen

1   drew those scores just now.

2   Only a score -- okay, obviously a score of 70

3   without the confidence band gets us into the definition of

4   mental retardation, correct?

5   A   No. That's not correct.

6   Q   My question, obviously, if you have a score of 70, that's

7   mild mental -- without the adaptive functioning aspect,

8   without the onset, assuming those are -- that's the only one

9   where we have got a case of mild mental retardation?

10 A   No, that's not correct, because a score in and of itself,

11 just by itself, is not something that is -- I mean, it's

12 cutoff, that you can't just look at the score on its own.

13 Q   Okay.

14 A   It's a score within a range, and that's how it needs to

15 be interpreted, not as a single score.

16 Q   Okay. A score of 70, according to the DSM is mental

17 retardation, correct?

18 A   You have to consider the adaptive effects, but yes.

19 Q   I'm talking about IQ. You're talking not here on

20 adaptive functioning. You're here on IQ, correct? Mainly?

21 You're mainly here to talk about IQ, right?

22 A   I'm mainly here to talk about functioning as a

23 neuropsychologist, so functioning in a number of different

24 domains.

25 Q   Right.

1316

James – Cross/Cohen

1   A   Not only of his IQ. My task was to assess functioning in

2   multiple domains.

3   Q   Right. I mean but you base that on the other experts.

4   You're the one who really looked the IQ score here, right?

5   A   I looked at IQ scores, but I also looked for evidence of

6   broader conceptual and intellectual difficulties across other

7   domains, using my own testing as well as reviewing records

8   that were reviewed.

9   Q   Right. Right. I'm sorry. We're going to get to the

10 other testing. Most of your report focused on the IQ,

11 correct?

12 A   Yes.

13 Q   Okay. And except for the fact that there was testing,

14 which I definitely want to talk about this. Let's stick with

15 the IQ. All right.

16   So an IQ score, forgetting about the adaptive

17 functioning, the first prong of the DSM is 70 or below,

18 correct?

19 A   That's correct.

20 Q   Now, you put a confidence band on that and if you score a

21 75, right --

22 A   That's correct.

23 Q   -- and if you apply the confidence band on a 75, you

24 could go down to a 70, right?

25 A   That's correct.

James – Cross/Cohen

1 Q   So that could get you there, right?

2   THE COURT: Get you where?

3   MS. COHEN: Get you to the definition in the DSM of

4 a 70, of mental retardation.

5 BY MS. COHEN:

6 Q   Applying the confidence band, right?

7 A   That's correct.

8 Q   A score of 80 can go down as far as a 75, correct?

9 A   That's correct.

10 Q   With a confidence band. But you don't -- once you get

11 down, if you have a score of 80, the lowest you get with a

12 confidence band is a 75, right?

13 A   Again, you're using -- this is the assumption that you're

14 using in an average, right?

15 Q   Right.

16 A   And that you're not doing this based on other on age or

17 --

18 Q   No, none of that --

19   THE COURT: Don't overspeak her.

20   MS. COHEN: Sure.

21   THE COURT: We can only put down one person's

22 statement at a time.

23   Go ahead.

24 BY MS. COHEN:

25 Q   Okay. So my point is, once -- if you have an 80, the

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1   lowest you're going to get with a confidence band on an

2   average is a 75, right?

3   A   If you're using five as your standard error of

4   measurement.

5   Q   And that 75 overlaps with the high band on a 70, right?

6   A   That is correct.

7   Q   Okay.

8   A   Again, if you're using five as your standard error of

9   measurement.

10 Q   Okay. But you don't apply the confidence interval. You

11 don't double count it, right? I mean, once you have got --

12 you have got a score of 80, the lowest you're going to get

13 with a confidence interval average is around a 75, right?

14 A   If -- again, it depends. The problem with answering this

15 question is that it's dependent on the size of the confidence

16 interval, and the confidence interval band could be much wider

17 than that, depending on your level of confidence. When you

18 increase your level of confidence, the band size is going to

19 increase, as well.

20 Q   We're talking about the average, just the concept. I

21 mean, I agree with your interpretation of the age changes.

22 And I'm just talking about assuming that's correct, that it's

23 the right average, okay? You only apply the confidence band

24 once, right?

25 A   That is correct, for each score that you have.

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James – Cross/Cohen

1   Q   Right. For every IQ test you have?

2   A   That's right.

3   Q   Okay. So once -- so you have an 80, the lowest you can

4   get with an 80 would be a 75, in terms of the low band, the

5   low broad band of the confidence interval under this example,

6   right?

7   A   Under this example, yes.

8   Q   Okay. All right. Now, we were talking before we get

9   into that and clarification, we were talking about now to

10 Dr. Nagler's score. Without Flynn, Dr. Nagler becomes -- is

11 a, well, a 70 with the arithmetic error, correct?

12 A   That's correct.

13 Q   And the reason why you said we can trust Dr. Nagler's

14 report is because her raw data exists, right?

15 A   I think we can have more -- we can give more weight to

16 the score.

17 Q   Okay. Now, in addition to her raw data, she's got

18 thorough notes, correct?

19 A   That's correct.

20 Q   And she also has notes throughout the testing papers,

21 right?

22 A   That's correct.

23 Q   And those notes reflect her clinical judgment, right?

24 A   That's correct.

25 Q   And we agreed earlier that the person administering the

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James – Cross/Cohen

1   test is in the best position to determine what that person --

2   what the test taker seems like on that particular date, right?

3   A   That's correct.

4   Q   And the notes in this case show that, in fact, Nagler's

5   score also has some problems, right?

6   A   That's correct.

7   Q   Right. In fact, Mr. Wilson, they demonstrate that he

8   wasn't perhaps giving his best effort, right?

9   A   I thought you were referring to the earlier arithmetic

10 error.

11 Q   Besides the arithmetic error, there are problems that she

12 explained in her notes, right?

13 A   Right.

14 Q   He yawned during the test, right?

15 A   That's right.

16 Q   He put his head on his desk, right?

17 A   That's correct.

18 Q   And obviously those are indications of him being tired?

19 A   Correct.

20 Q   Not giving his whole effort, right?

21 A   That's correct.

22 Q   He also blurted out an answer, right?

23 A   That's correct.

24 Q   And she described him as being going a careless,

25 impulsive approach?

James – Cross/Cohen

1   A   That's right.

2   Q   So those things are important when you're looking at this

3   score, right?

4   A   That's correct.

5   Q   Now, you explain in your report that -- and on direct

6   that other problems that cannot be -- the reason we need to

7   check the work is because there could be a partial

8   administration of a test, right?

9   A   That's correct, as we see.

10 Q   A nonstandard administration, right?

11 A   As occurred in Drezner.

12 Q   And that's because --

13 A   And in Pop.

14 Q   And in Pop, because prorated, correct?

15 A   That's correct.

16 Q   Okay. Now, Drezner -- Drezner used a supplemental score,

17 right?

18 A   That's correct.

19 Q   And that's something that a psychologist can do, correct?

20 A   Under various certain conditions.

21 Q   Okay. In this case, Dr. Drezner gave the test in mazes,

22 correct?

23 A   That's correct.

24 Q   In fact maze is often characterized as a harder test than

25 the -- than the that she skipped, which was I think was object

James – Cross/Cohen

1   assembly, right?

2   A   You would have to show me where it has been characterized

3   as harder.

4   Q   Okay. Well, we'll go back to that. I don't have it

5   right here. I want to slow it up.

6   Would you say that it's easier?

7   A   It measures something completely different.

8   Q   So you don't think that's a good test to supplement, is

9   that what you're saying?

10 A   You wouldn't supplement it, unless there are very

11 specific reasons under which you would supplement tests. One

12 would be if the test that is supposed to be part of the core

13 is spoiled. Her reasoning for supplementing the test was

14 because he liked it better.

15 Q   Okay. And do you have any basis for saying that that was

16 improper?

17 A   Yes. Because the core subtest are the core subtests for

18 a reason. They're there because those core subtests have been

19 determined statistically to reflect when they're all together,

20 the full scale IQ. So substituting it because he likes it

21 better is not a good reason for making that change.

22 Q   Okay. And is your opinion on that, is that something

23 that you determined over the years or is that based on some

24 literature or something along those lines?

25 A   The manuals tell you under what condition it's

James – Cross/Cohen

1   appropriate to substitute a score, substitute tests. And

2   there are very clear about substituting a test when -- in

3   situations where a test is spoiled.

4   Q   Okay. And in fact, the manuals indicate when it is

5   proper to prorate, right?

6   A   I'm sorry. I thought you were talking about --

7   Q   Oh, we --

8   A   Drezner.

9   Q   We're moving on now?

10   A   Oh, okay.

11   Q   Talking about prorating.

12   Dr. Pop, you said one of his big problems was he

13   prorated, right?

14   A   That's correct.

15   Q   And he prorated picture arrangement, right?

16   A   He did not give picture arrangement. Did not give symbol

17   search. So he prorated the performance scale.

18   Q   He prorated, right?

19   A   Therefore, also prorated the full scale IQ.

20   Q   Okay. And that you say is one of big reasons why we

21   can't rely on him, correct?

22   A   It's one of the reasons.

23   Q   Okay. Well, let's take a look at the back of

24   Dr. Drezner's score -- excuse me, Nagler's score. Let me put

25   up on the Elmo. This is GOV-003946. It's part of exhibit

James - Cross/Cohen

1   C-5, and it is the raw data.

2   Oh, by the way but before I put this down,

3   Dr. James, you indicated when you discussed -- when you

4   discussed Nagler, that she -- that one of the pages of the

5   test was missing, right?

6   A   That's correct.

7   Q   Now, here is her summary of these of the subtests and the

8   scores. Is that that what this is?

9   A   (Peruses document.)

10 Q   I was just asking, is that her summary?

11 A   Yes, yes. It is.

12 Q   Now, take a look at object assembly.

13 A   That's correct. Yes.

14 Q   There's no raw score in that on that test, right?

15 A   I see a scaled score.

16 Q   You see a scaled score, but there's a dash in the object

17 assembly, right?

18 A   Yes.

19 Q   Now, taking a look at Government Exhibit -- sorry, not

20 Government Exhibit -- the same exhibit, C-5, and it's marked

21 GOV-003942. It's a couple pages earlier.

22 A   (Peruses document.)

23 Q   Okay. And do you see those are Nagler -- she also

24 indicated all the scores in this summary, right?

25 A   That's correct.

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James – Cross/Cohen

1   Q   And you'll see under object assembly, she has a dash,

2   right?

3   A   Yes.

4   Q   And that is actually an indication if you look a back,

5   that Nagler also prorated, correct?

6   A   I don't think that she did, because she has this actual

7   score for object assembly.

8   Q   Right. But the manual, this is the WISC-3, right?

9   A   That's correct.

10   Q   The manual actually talks about prorating, right?

11   A   That's correct.

12   Q   And now I'm reading from page 54 of the WISC-3 manual,

13   "If only four subtests scores are available for either the

14   verbal or the performance scale, the sum of subtests scaled

15   scores on the effected scale must be prorated to obtain a

16   verbal score or performance score that will be used to derive

17   the IQ score."

18   And then it gives an instruction how to prorate it,

19   right? And it refers you to a summary. It refers you to a

20   table in the back, and it also indicates that you should

21   record the abbreviated PRO for prorate.

22   Now, taking a look at the prorated scores, like

23   you'll put this on the Elmo for a minute. Nagler's score, if

24   you add up the ones are actually -- let me switch this for a

25   second. If you add Nagler's scores up, she had a nine, a

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1   four, a five, and a nine. And this object assembly was seven.

2   That's circled, right?

3   A   That's correct.

4   Q   And symbol search had a parenthesis and that's because

5   she gave an extra test, right?

6   A   It's not an extra, because it's added in the full scale.

7   Q   Okay. But in parenthesis, it's symbol search. It's not

8   necessary to give it as an extra?

9   A   It's necessary to give it for the full scale. It's not

10 necessary to give it for the performance IQ.

11 Q   She could have got an accurate full scale without giving

12 either digit span or symbol search?

13 A   She needed symbol search for the full scale.

14 Q   Okay. Now, taking a look at -- well, the sum of scaled

15 scores does not include the eight? The symbol search score,

16 because it's a third and four?

17 A   That's correct.

18 Q   Okay. So that's not included in that. So taking that

19 third and four, the nine, the four, the five and the nine,

20 let's skip the seven for a minute. That equals 27, right?

21 Because five and four is nine and nine times three is 27,

22 correct?

23 A   That's correct.

24 Q   Now, if you look in the back of the manual for prorating

25 at this time, you see where this arrow is at 27?

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James - Cross/Cohen

1   A   That's right.

2   Q   And prorating score is 34, right?

3   A   That's correct.

4   Q   Okay. And how you arrive at what the actual scaled score

5   for the individual test that you prorate is to substract the

6   prorated score from the subtest scaled scores and you get the

7   difference, right?

8   A   That's correct.

9   Q   Okay. And in this test, in this case, the difference

10   between those two is a seven, right?

11   A   That's correct.

12   Q   Okay. So Nagler in fact prorated as well, correct?

13   A   I don't know that she prorated because she has a score in

14   there as a seven.

15   Q   But didn't we just review the fact that the seven that's

16   how would you figure out what the scaled score is, right?

17   A   That's correct. If you were a prorating, but I need to

18   take a look at the raw data in order to see that.

19   Q   Okay. Well, isn't it pretty good evidence that Nagler

20   prorated considering, one, there's no object assembly score

21   sheet, right?

22   A   Yes, but I believe that the -- that when I looked at this

23   raw data, there was a page that was missing that also

24   included -- there is a page just missing, period.

25   Q   There's a page that is missing because she never gave the

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1   object assembly test, right?

2   A   (Peruses document.)   The page that I believe that was

3   missing -- let me just take a look at here.

4   Q   Take your time.

5   A   (Peruses document.)   The page that's missing is the page

6   between vocabulary and comprehension.

7   Q   Okay.

8   A   So we're missing the beginning of comprehension as well

9   as the page that would have objects assembly on it. So that

10   information is missing. So it doesn't say anywhere in her

11   writeup that she prorated, and we have a score. So we are

12   missing the page that would tell me whether or not she did --

13   whether if she didn't give object assembly, but there is a

14   score that she put there, and has not said she prorated.

15   Q   Number one, we don't have all the data?

16   A   We're missing that specific page.

17   Q   Okay. Despite the fact that you say we can rely on this,

18   we don't have all the data. That's number one, right?

19   A   We don't have that page, but we have a score for object

20   assembly.

21   Q   We have a score that's circled, right?

22   A   That's correct.

23   Q   In your experience, when you prorate, first of all, you

24   should put PRO, right?

25   A   I don't necessarily put PRO, but I indicate that I

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1   prorate.

2   Q   Well, in the manual, it indicates that you should put PRO

3   an indication of prorate can also be a circle of a score,

4   correct?

5   A   I don't know.

6   Q   You don't know because Nagler is not allowed to ask. We

7   know that, right?

8   A   That's correct.

9   Q   We can't ask her. But she has a dash for object

10   assembly. She doesn't have the sheet in there. She has a

11   dash on the scale, on the score sheet we looked at and she's

12   got an empty box on the page where she emptied -- entered all

13   the scores.

14   So is it your testimony, coincidentally, that

15   prorated score happens to match but yet, she didn't put the

16   data in there?

17   A   I don't know.

18   Q   Okay. We don't know.

19   A   No.

20   Q   All right. But clearly, if Nagler prorated, according to

21   you, we shouldn't rely on her score, as well?

22   A   I don't think I ever said that we shouldn't rely on any

23   of the scores. I never said that. I never talked about

24   disregarding scores. I'm talking about relative weight that

25   we put on scores.

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1   Q   Okay. Well, let's talk about relative weight for a

2   moment. We looked -- forget Flynn for a moment, because let's

3   just look at this full scale IQ, right? Let's -- this is

4   helpful the other day. Let's just highlight that line.

5   Dr. James, you would agree that taking out Nagler,

6   these scores are consistent, correct?

7   A   (Peruses document.)

8   Q   Generally?

9   A   Which are we looking for?

10   Q   The one is -- the line is just looking at the full scale

11   IQs?

12   A   Yes.

13   Q   And that these scores are consistent.

14   A   Yes.

15   Q   They're consistent?

16   A   Yes.

17   Q   Mr. Wilson had again, not to -- we don't have a full

18   scale for Frank, okay? He's got now nine IQ scores, right?

19   And doesn't statistics in general tell us that when nine times

20   we come up with basically the same score, that that's a pretty

21   good reliability of the score?

22   A   Not necessarily so.

23   Q   Okay.

24   A   Given the sources of error that I mentioned before. So,

25   we have variability in scores that there -- there's

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1   variability that comes into these scores, because of sources

2   of error.

3   Q   Right. You would agree with me, would you not, that if

4   you have an outlier among two hundred of the same scores --

5   A   Uh-hum (affirmative response).

6   Q   -- the mistake --

7   A   Yes.

8   Q   -- some errors are more likely going to be suspected in

9   the outlier, correct?

10 A   If it's an outlier, yes.

11 Q   And here, we have Nagler's is the lowest score by quite a

12 bit, right? I mean, within this small range, right?

13 A   (Peruses document.)

14 Q   I mean, the next highest score is -- well, four, well

15 actually six points up, right?

16 A   Yes. Or which are -- this column are you looking at?

17 Are you looking at the corrected full scales IQs?

18 Q   No, just looking at the full scale IQ, where it's

19 highlighted.

20 A   That's correct.

21 Q   Okay. So and we know that Nagler's test has some

22 indication that Mr. Wilson wasn't trying, right?

23 A   Yes. There are some indication is that he wasn't putting

24 forth the best effort on that test.

25 Q   Okay. And despite that fact, dispute that evidence --

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1   A   Uh-hum (affirmative response).

2   Q   -- and despite the fact that the other eight scores are

3   consistent, you're still asking this Court to heavily weigh

4   the Nagler score, correct?

5   A   Well, I think that there are reasons, as I mentioned, to

6   rely upon the three scores that I would like to rely on

7   because of the level of confidence that I can have, like I

8   said, raw data, particularly and some other problems with the

9   other scores.

10   I think these scores, when you even look at the

11   Nagler score, again, we don't want to be looking at scores

12   without the confidence interval bands around them, and we

13   don't want to be looking a the scores that aren't corrected

14   because the full scale IQ scores need to be corrected for

15   obsolete norms.

16   Q   Okay.

17   A   So when we look at that band, these scores are all very

18   similar. If we see them in the band of the confidence

19   interval, as we should, given that IQ scores are -- represent

20   variability and there's variability in IQ scores.

21   Q   Right. But all we're looking -- all we're talking about

22   is consistency. So we can do the same analysis whether the

23   score, a 150 or 50. We're just talking about consistency, the

24   reliability of the scores, correct?

25   A   Right.

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1   Q   The band of confidence doesn't really matter when we're

2   looking at inconsistencies, right?

3   A   It does, because the confidence interval is based on a

4   standard error of measurement, which is about the consistency

5   of the test.

6   Q   Right. But if you look at the consistency, the band of

7   confidence is just going to put it in a different range, but

8   it's just going to shift it. You're still looking at

9   consistencies, correct?

10 A   But you can't look at scores without that band is what

11 I'm try trying to say.

12 Q   But what the band does is it allows us to say, okay,

13 there could be errors, right?

14 A   What the band does is allow us to be more confident about

15 the range of scores that are present.

16 Q   Okay. And nine scores with the same scores is also an

17 indication of confidence in those four scores, correct?

18 A   It is not the same level of confidence that I would have

19 without that band.

20 Q   Right. Okay. But so it's just coincidence that either

21 all of these psychologists either A, all were completely --

22 they all made errors, right?

23 A   I don't think I said that they all made errors.

24 Q   Now, but we talking about the scores being all the same?

25 If that's not significant that either these psychologists were

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1   either lying, right? Or they made errors, that's the only

2   choice, right?

3   A   I'm not sure what you're -- I'm a little confused by your

4   question.

5   Q   You're saying we can't look at these other scores because

6   we can't test them without the raw data for the errors,

7   correct?

8   A   I'm saying that you have to look at the scores and give

9   them different weights, depending on the information that you

10   have about them. I'm saying that there are scores that you

11   can be more confident in and scores that you can be less

12   confident in. I never said that you have to throw out or

13   disregard particular scores.

14   Q   Okay. And I'm asking you that isn't it true that another

15   way people decide whether they have confidence in something is

16   the amount of time in which they come up with the same result,

17   correct?

18   A   That is true.

19   Q   Okay. So, now, let's talk about Dr. Pop's score for a

20   moment. Now, Dr. Pop's score, you mentioned -- Dr. Pop's

21   score was taken -- I think it was in 2000, when Mr. Wilson was

22   17 years old and eight months, right?

23   A   That's correct.

24   Q   So if you were just looking at these scores and saying

25   what's the best test to look at for age, this would be a good

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1   one, right?

2   A   No, it wouldn't necessarily say that.

3   Q   Well, in an individual's intelligence, right, is

4   continuing developing until they're 18 years old, correct?

5   A   No. I don't know that there's any evidence to say that

6   there is an end point at 18.

7   Q   Well, mental retardation is defined by the onset before

8   age 18, right?

9   A   That is true.

10 Q   And so a score that is right before someone's 18 birthday

11 would be a good assessment of that person's intelligence,

12 right?

13 A   It depends.

14 Q   Well, by the time you're 18, you would have gotten more

15 schooling, right?

16 A   In some cases yes, in some cases no.

17 Q   Right. So it's a good -- your brain is pretty much

18 developed by that point, right?

19 A   No, that's not the case. There is a wealth of research

20 to suggest there's continuing brain development, particularly

21 in frontal lobe networks of the brain into the twenties and

22 possibly early thirties.

23 Q   But there's a reason why the DSM defines mental

24 retardation as onset before 18, right?

25 A   It defined it that way to distinguish it from other

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1   disorders in which the onset of the difficulties is in

2   adulthood, for example, dementia.

3   Q   But when you are developing your brain, a score when

4   you're almost 18 is a good time to look at it, right? Because

5   it takes away the fact that -- the problems with the younger

6   score, right? When you're younger?

7   A   Depends on when you say how much younger.

8   Q   Well, you talked before about the problems when he was

9   six and problems when he was nine and the problems with those

10   scores because of his age, right?

11   A   Yes. among other problems that those scores had.

12   Q   Right. But before the age -- if we're looking at onset

13   before the age of 18, a score close to his 18th birthday is

14   definitely a relevant score?

15   A   As they all are, yes.

16   Q   Okay. So Dr. Pop or psychologist Pop. I'm not sure if

17   he's a doctor or not. You would agree that he took sometime

18   as did all these psychologists in evaluating Mr. Wilson,

19   right? I mean, his reports indicates that he took sometime,

20   right?

21   A   That's correct.

22   Q   Now, he said that Mr. Wilson, in analyzing his scores --

23   and I'm referring to GOV-004023, psychologist Pop noted,

24   quote, the note he said the clearly average outcomes for tasks

25   concern with verbal abstract reasoning, and practical and

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James – Cross/Cohen

1   social knowledge, suggesting the capability to operate

2   verbally.

3   Do you recall that?

4   A   I do.

5   Q   And some of the things that psychologist Pop is talking

6   about are the very things we talked about people with people

7   with mental retardation have difficulty with, correct?

8   A   That's correct. In contrast, though, if you look at some

9   of the narratives of other evaluators, they describe

10 significant difficulties in the verbal area.

11 Q   Okay.

12 A   But in terms of core language skills and also abstraction

13 skills.

14 Q   Okay. Let's just focus on Pop for the moment, okay?

15 A   Okay.

16 Q   So Pop said that, correct?

17 A   That is correct.

18 Q   And Pop was also -- psychologist Pop was also concerned

19 about Mr. Wilson's short term memory, correct?

20 A   That's correct.

21 Q   And in fact, he took care to do further testing on that,

22 right. Do you recall that?

23 A   Could you point that out to me, where he did -- what

24 further testing was done --

25 Q   Okay.

James – Cross/Cohen

1   A   -- by Dr. Pop.

2   Q   He said also, "Ronell's performance on a visual short

3   term memory task was low average to average."

4   Now, that's still above mild mental retardation,

5   borderline, but he was concerned about it, right?

6   A   That's correct.

7   Q   Okay. Well, actually, I withdraw that, the next line

8   showing that he's concerned about.

9   "To express the possibility of a short term memory

10   weakness, another subtest was completed."

11   So that indicates Pop was concerned about it, right?

12   A   That's correct.

13   Q   And this task, he writes, "Concerns auditory memory and

14   processing of numbers and letters. Ronell's score was high

15   average. As a result, working memory index was in the 25

16   percentile. Therefore, the possibility of a short term memory

17   or working memory deficit is ruled out, based on available

18   data."

19   Do you recall that?

20   A   I recall that, and actually, that is an outlier in

21   contrast to what you had talked earlier about his arithmetic.

22   Q   Right.

23   A   As a measure of auditory short term memory auditory

24   attention, he performed poorly on that later in his life and

25   later in life, has shown persistent working memory deficit.

James – Cross/Cohen

1   Q   All right. We talked about that. We talked about that

2   could also be an issue with variety of other things, like

3   ADHD. Could that also affect that?

4   A   That is true. Individuals with ADHD have working memory

5   issues. So he does have working memory issues.

6   Q   All right. But my point is actually not to argue whether

7   or not he's got difficulties in this area, as we've already

8   established he does. But just that Mister -- or psychologist

9   Pop shows by this that he took an extra concern in Mr. Wilson

10 in this area, right?

11 A   That's correct.

12 Q   He didn't just do an IQ score, put down the scores and

13 walk away, right?

14 A   I don't know.

15 Q   Well, did you talk to Mister -- psychologist Pop?

16 A   No, I didn't.

17 Q   You know that the defense team talked to him?

18 A   That's correct.

19 Q   And you didn't talk to any of the psychologists in this

20 case?

21 A   No, I didn't.

22 Q   And they were available to you, right?

23 A   They weren't made available to me.

24 Q   But were you told that you couldn't speak to them?

25 A   No. It wasn't my task to speak to the psychologists in

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James – Cross/Cohen

1   the case.

2   Q   Okay. Your task was to evaluate each of these IQ scores,

3   right?

4   A   That's correct.

5   Q   And your task is to find out whether or not this

6   individual has mild mental retardation, correct?

7   A   My task was to determine if he needed additional testing.

8   Q   Right.

9   A   Neuropsychological testing, and conducting that

10   neuropsychological testing to make that determination.

11   Q   But your job is to look at these scores and decide what

12   his true IQ is, right?

13   A   Well, I don't think we can determine what his true IQ

14   score is.

15   Q   What the best estimate of his IQ score is, correct?

16   A   That's correct.

17   Q   And you also agree with me that the person who is the

18   test administrator is the best person to assess how an

19   individual performed on a given IQ test, correct?

20   A   That's correct.

21   Q   And you didn't talk -- you don't bother to talk to any of

22   the people who actually had administered these tests, correct?

23   A   That's correct.

24   THE COURT: All right. I think we're going to take

25   our lunch break right now.

CHARISSE KITT, CRI, CSR, RPR, FCRR
Official Court Reporter

James – Cross/Cohen

1   MS. COHEN: Okay.

2   THE COURT: We'll be back. One hour for lunch.

3   We'll be back at two. Thank you.

4   (Luncheon recess.)

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